SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term 1967

JOSEPHINE HANNER,
Petitioner,

v.

CECIL DEMARCUS,
Respondent.

No. 497

APPENDIX
OF
RECORD

PHILIP M. HAGGERTY
1220 Arizona Title Building
111 West Monroe
Phoenix, Arizona
Attorney for Petitioner

ROBERT JOHN WALTON
610 Arizona Land Title Building
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Phoenix, Arizona
Attorney for Respondent

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111 West Monroe
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2200 North Central Avenue
Phoenix, Arizona
Attorney for Respondent

Case No. 49044:

JUDGMENT AND DECREE OF DIVORCE

June 21, 1959

Paragraph II

That the sum of $5,572.10 is a reasonable sum as asked for as Master's fee and it should be paid to Harold DeMarcus of the firm of Crane and DeMarcus, as Master, within a reasonable time; that said sum and said Master was necessary by reason of the action of the defendant, Josephine E. Hanner, and that the defendant, Josephine E. Hanner, should pay the aforesaid sum to Harold DeMarcus of Crane and DeMarcus, Master, within a reasonable time, and that sixty days from the signing of this Judgment that the Master May have a Writ of Execution against the Defendant, Josephine E. Hanner, if not paid.

* * *

EXHIBIT B
SHERIFF'S DEED
49044

THIS INDENTURE, Made the 27th day of March, 1962, BETWEEN L. C. BOIES, Sheriff of the County of Maricopa, State of Arizona, the party of the first part, and HAROLD De MARCUS of said County of Maricopa, the Party of the second part.

WHEREAS, by virtue of a Writ of Execution issued out of and under the seal of the Superior Court of the County of Maricopa, State of Arizona, attested the 18th day of September, A.D. 1959, upon a judgment recovered in said Court on the 2nd day of June, A.D. 1959, in favor of HAROLD DeMARCUS, and against JOSEPHINE E. HANNER, to the said Sheriff directed and delivered, commanding him that out of the personal property of said judgment debtor in said county, he should cause to be made certain moneys in the said writ specified, and if sufficient per-

sonal property of the said judgment debtor could not be found, then he should cause the amount of said judgment to be made out of the real property belonging to said judgment debtor on the 2nd day of June, A.D. 1959, or at any time afterwards;

AND, WHEREAS, because sufficient personal property of the said judgment debtor could not be found, whereof the said Sheriff could cause to be made the moneys specified in said writ, the said Sheriff did, in obedience to said command, levy on, take and seize all the right, title, interest and claim which the said judgment debtor so had to the lands, tenements real estate and premises hereinafter particularly set forth and described, with the appurtenances, and did, on the 29th day of October, A.D. 1959, sell all the right, title, interest and claim of the said judgment debtor in and to the said premises, at public auction, in front of the Court House, in the City of Phoenix, in said County of Maricopa, between the hours of nine in the morning and five in the afternoon of that day, namely, at 10:05 o'clock A.M., after having first given due notice of the time and place of such sale according to law; at which sale all the right, title, interest and claim of said judgment debtor in and to the said premises, were struck off and sold to the said party of the second part for the sum of *FIVE THOUSAND SEVEN HUNDRED FORTY and 05/100---- DOLLARS* lawful money of the United States of America, the said party of the second part being the highest bidder, and that being the highest sum bid for the same, whereupon the said Sheriff, after receiving from the said purchaser the said sum of money so bid as aforesaid, gave to the said party of the second part such certificate of said sale as by law directed to be given, and a duplicate of such certificate was duly filed by the said Sheriff in the office of the Recorder of the County of Maricopa.

And whereas, six months after said sale have expired without any redemption of the said premises to made, and provided for, and in consideration of the said sum of money, to him in hand paid as aforesaid, by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold,

conveyed and confirmed, and by these presents does grant, bargain, sell, convey and confirm unto the second party, and to his heirs and assigns forever, all the right, title, interest and claim which the said judgment debtor, JOSEPHINE E. HANNER had on the said 2nd day of June, A.D. 1959, or at any time afterwards, or now has in and to all that certain lot, piece or parcel of land situate, lying and being in the said County of Maricopa, State of Arizona, and bounded and particularly described as follows, to-wit:

Lots 17, 18, 19 and 20 Wells Place, Maricopa County, Arizona, TOGETHER with all and singular the hereditaments and appurtenances thereto belonging, or in any wise appertaining.

TO HAVE AND TO HOLD the said premises with the appurtenances unto said party of the second part, his heirs and assigns forever, as fully and absolutely as the said Sheriff can, may, or ought to, by virtue of the said writ, and of the Statute in such cases made and provided, grant, bargain, sell, convey and confirm the same.

IN WITNESS WHEREOF, the Sheriff, the said party of the first part, has hereunto set his hand and seal, the day and year first above written.

L. C. BOIES (Seal)
Sheriff of the County of Maricopa
State of Arizona

STATE OF ARIZONA }
SS:
COUNTY OF MARICOPA }

On this 27th day of March, 1962, personally appeared before me, the undersigned authority, within named L. C. BOIES, Sheriff of the County of Maricopa, State of Arizona, known to me to be the person described in and whose name is subscribed to the within instrument, and he, acknowledged to me that he, as such Sheriff of said County, executed the same for the purpose and consideration therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal of office at my office in the County of Maricopa, State of Arizona, the day and year in this Certificate first above written.

Mort H. Baskin
Notary Public in and for the County of Maricopa, State of Arizona. My commission Expires April 30, 1965.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA.

CECIL DE MARCUS, also known as HAROLD DE MARCUS, and RACHEL DE MARCUS, his wife,

Plaintiffs,

vs.

BETTY JO KNIGHT, Unknown Heirs of BETTY JO KNIGHT, if deceased, ARTHUR E. HANNER, Unknown Heirs of ARTHUR E. HANNER, if deceased, JOSEPHINE E. HANNER, formerly known as JOSEPHINE E. KNIGHT, Unknown Heirs of JOSEPHINE E. HANNER, if deceased GLENN A. NESBITT, Unknown Heirs of GLENN A. NESBITT, if deceased, GLADYS BARND, Unknown Heirs of GLADYS BARND, if deceased,

Defendants.

No. 145140

COMPLAINT

ACTION FOR QUIET TITLE

(Filed 12-17-62)

COMES NOW the above named plaintiffs by and through

their attorneys, Vanlandingham & Stoneman, for the cause of action in the above entitled matter states as follows:

I

That the plaintiffs and defendants are residents of Maricopa County, Arizona, and that certain real property which is the subject of this suit and hereinafter described is situated in Maricopa County, Arizona.

II

That the above named plaintiffs are the true and lawful owners of that certain real property situated in Maricopa County, Arizona, more particularly described as follows:

Lots 17, 18, 19 and 20, Wells Place, according to Book 40 of Maps, page 47, records of Maricopa County, Arizona.

III

That the above named defendants and each of them claim some color of title to the above described real property, which claims constitute a cloud on plaintiffs' title to said property, but that all such claims and each of them is inferior to the title held by these plaintiffs and in fact are not real and valid claims whatsoever.

IV

That on or before the 17th day of November, 1962, more than 20 days prior to filing this action, these plaintiffs demanded a quitclaim deed from each of the above named defendants pursuant to Section 12-1103 A.R.S. and tendered therewith the sum of Five Dollars ($5.00) each as required by said statute and all of said defendants have failed or refused to execute said quitclaim deeds.

V

That plaintiff has been required to retain legal counsel and institute this action and that the reasonable costs as and for attorneys fees should be adjudged against defendants as part of the cost of this action.

WHEREFORE plaintiffs pray:

1. That the defendants and each of them be required to set forth all their adverse claims to the property above described. 2. That the same be adjudged null and void, and that they be decreed to have no estate or interest in, or lien or encumbrance, upon said property. 3. That this title be quieted in the plaintiffs as to all adverse claims, and that defendants be forever debarred and enjoined from further asserting the same. 4. That the plaintiffs recover possession of the premises described. 5. For judgment for plaintiffs and against the above named defendants and each of them for reasonable costs and attorney fees incurred in this action and for such other further relief as the court may deem just and equitable.

VANLANDINGHAM & STONEMAN
By /s/ MICHAEL H. LYNN

STATE OF ARIZONA }
County of Maricopa } SS.

Comes now Cecil DeMarcus, being first duly sworn on oath, states that he is the plaintiff for the above entitled action, that he has read the foregoing complaint, knows the contents thereof and that it is correct to the best of his knowledge.

/s/ CECIL DeMARCUS

Subscribed and sworn to before me this 17th day of December, 1962.

/s/ RUTH I. PATTERSON
Notary Public

(TITLE OF COURT AND CAUSE)

SEPARATE ANSWER OF DEFENDANT, JOSEPHINE E. HANNER formerly known as JOSEPHINE E. KNIGHT
(Filed 1/17/63)

COMES NOW the defendant, JOSEPHINE E. HANNER,

formerly known as JOSEPHINE E. KNIGHT, by and through her attorney, JOHN M. LEVY, and for no other defendant, and for her answer to plaintiffs' complaint on file herein, admits, denies and alleges as follows:

I

Admits Paragraph I of said complaint.

II

These defendants, answering Paragraph II of plaintiffs' complaint, denies said paragraph, and the whole thereof.

III

Answering Paragraph III of plaintiffs' complaint, admits that this defendant claims some color of title to the property described in plaintiffs' complaint and denies the remainder of the allegations in said paragraph and in this connection alleges that the property described in said complaint is held in joint tenancy with Betty Jo Knight, her daughter, which deed to Lot 17 was executed on September 15, 1948 from John L. Wells and Vivian Cleata Wells to Betty Jo Knight and Josephine E. Knight, and recorded September 16, 1948 in Docket 273, at pages 431 and 432; the deed to lot 18 being dated March 15, 1948, being a joint tenancy deed, recorded July 10, 1948 in Docket 242 at pages 501-2; and the joint tenancy deed to Lots 19 and 20 being dated July 4, 1948 and recorded July 10, 1948 in Docket 242, pages 507-8, in the Office of the Maricopa County Recorder.

IV

This defendant admits Paragraph IV of plaintiffs' complaint; admits that this defendant has failed and refused to accept said quit claim or accept the sum of $5.00 for the reason that she is the owner of said property mentioned in plaintiffs' complaint, in joint tenancy with her daughter, Betty Jo Knight, as aforesaid.

Answering Paragraph V of plaintiffs' complaint, this defendant alleges that she has no information or belief sufficient to form a belief as to any or either of the allegations contained in said Paragraph V and upon these grounds denies same.

V

FOR A FURTHER SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

I

That this answering defendant claims color of title to the property described in plaintiffs' complaint by virtue of the fact that the same is owned by her in joint tenancy with Betty Jo Knight, her daughter, in which the deed to Lot 17 was executed by John L. Wells and Vivian Cleata Wells, on September 15, 1948 to Betty Jo Knight and Josephine E. Knight, and recorded September 16, 1948 in Docket 273, at pages 431 and 432; the deed to Lot 18 being dated March 15, 1948, also a joint tenancy deed, recorded July 10, 1948 in Docket 242 at pages 401-2; and the joint tenancy deed to Lots 19 and 20 being dated July 5, 1948 and recorded July 10, 1948 in Docket 242, at pages 507-8, in the Office of the County Recorder of Maricopa County, Arizona.

II

That since plaintiffs in this action saw fit to name this defendant in the quiet title action, this defendant was compelled to engage an attorney to defend her in said action and has engaged JOHN M. LEVY, a practicing attorney in all courts of the State of Arizona to defend her and that she has incurred an expense of reasonable attorney fees and costs, which should be adjudged against the plaintiffs.

III

That it appears to this defendant that plaintiffs in this action were not a party in Cause No. 49044 in the Superior Court of Maricopa County, State of Arizona, in which action Arthur E. Hanner is plaintiff and Josephine E. Hanner is the defendant and that any judgment or execution issued in favor of these plaintiffs in said action is null and void and of no effect, and that plaintiffs in the above-entitled and numbered cause have no legal or beneficial interest in the property described in plaintiffs' complaint and that any execution issued in favor of the

above-named plaintiffs in said Cause No. 49044 should be set aside and held for naught and that any execution issued by the above-named plaintiffs in that action was wrongfully and unlawfully obtained; that no notice of any kind was given to Josephine E. Hanner, formerly known as Josephine E. Knight, or Betty Jo Knight.

IV

This defendant demands trial by jury.

/s/ JOHN M. LEVY
ATTORNEY FOR DEFENDANT.
JOSEPHINE E. HANNER formerly
known as JOSEPHINE E. KNIGHT
525 Greater Arizona Sav. Bldg.
Phoenix, Arizona

STATE OF ARIZONA }
} SS:
COUNTY OF MARICOPA }

JOSEPHINE E. HANNER, formerly known as JOSEPHINE E. KNIGHT, being first duly sworn upon oath deposes and says:

That she is one of the defendants in the above-entitled and numbered cause and makes this verification in her own behalf and for no other defendant; that she has read plaintiff's complaint on file herein and the above and foregoing answer thereto and knows the contents thereof; that the matters alleged in said complaint and denied above are untrue; that the matters alleged in the above answer are true of her own knowledge except those which are alleged to be upon information and belief, and as to such matters, she believes them to be true.

/s/ JOSEPHINE E. HANNER
JOSEPHINE E. HANNER, formerly
known as JOSEPHINE E. KNIGHT

Subscribed and sworn to before me this 16th day of January, 1963.

/s/ ELIZABETH CAIN
Notary Public

My commission expires
August 4, 1966

COPY MAILED this 17th day of January,
1963 to VAN LANDINGHAM & STONEMAN,
Attorneys for Plaintiffs
Suite 202 — 5800 North 19th Avenue,
Phoenix, Arizona

JOHN M. LEVY
Attorney for Defendant,
Josephine E. Hanner, formerly known
as Josephine E. Knight

(TITLE OF COURT AND CAUSE)
MOTION FOR SUMMARY JUDGMENT
(Oral Argument Requested)
(Filed 7/25/63)

COMES NOW the above-named Plaintiffs, by and through their attorneys, VAN LANDINGHAM & STONEMAN, and hereby moves the Court to grant Plaintiffs Summary Judgment against the Defendants and each of them as prayed for in Plaintiffs' Complaint, for the reason and on the grounds that the pleadings on file and the affidavits and exhibits attached hereto show that there is no genuine issue as to any material fact and that the moving party is entitled to Judgment as a matter of law (pursuant to Rule 56 of the Arizona Rules of Civil Procedure).

VANLANDINGHAM & STONEMAN

/s/ JOHN VANLANDINGHAM
John Vanlandingham
Attorneys for Plaintiffs
5800 North 19th Avenue
Suite 202
Phoenix, Arizona

MEMORANDUM OF POINTS AND AUTHORITIES

The facts in this case may be summarized as follows: This

is an action for quiet title brought by the Plaintiff, Cecil DeMarcus, also known as Harold DeMarcus. Each of the Defendants have appeared and answered, alleging certain defenses. However, it is the position of the Plaintiff that none of these defenses raised by the Defendants constitute any legal defense and that the pleadings on file together with the affidavits show that there is no genuine issue as to any material fact; and that the Plaintiff is entitled to judgment as a matter of law.

To set the background for this position, we herein set out certain facts which we believe are not and cannot be controverted, and therefore must be taken as true, along with the matters of law by which the Plaintiff is entitled to judgment.

There was a divorce case in the Superior Court, in and for the County of Maricopa, No. 49044, "Arthur E. Hanner, Plaintiff, vs. Josephine E. Hanner, formerly known as Josephine E. Knight, Defendant", both of whom are defendants in this action. This was a greatly contested divorce matter, wherein, on stipulation of Counsel for both parties, the Court appointed a Special Master, one Cecil DeMarcus, Certified Public Accountant (the Plaintiff in this action), see Exhibit A, page 2, line 14 through 16. Cecil DeMarcus, CPA, as Special Master undertook and completed his duties. In the final judgment entered June 21, 1959, the Court ordered the payment to Cecil DeMarcus, his fees as Master, with the provision that these fees should be paid by the Defendant in that case, Josephine E. Hanner, formerly known as Josephine E. Knight, and that if not done within sixty (60) days after rendition of said Judgment, that execution should issue as provided by the Arizona Rules of Civil Procedure, Rule 53(A), (See Exhibit A, page 14, line 1 through 17),

"The Court in any action to be tried without a jury may appoint a special master therein. As used in these Rules, the word 'master' includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the Court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the Court as the Court may direct. The Master shall not retain his report as security for his com-

pensation but when the party ordered to pay the compensation allowed by the Court does not pay it, after notice and within the time prescribed by the Court, the master is entitled to a writ of execution against the delinquent party."

Thereafter, Cecil DeMarcus made demand upon the Defendant, Josephine E. Hanner, formerly known as Josephine E. Knight, for the payment of the Master's fees. Since the fees were not paid, execution issued on September 18, 1959. Levy was made on the real property concerned herein, to wit: Lots 17, 18, 19 and 20, WELLS PLACE, which had been set aside as separate property to the said Josephine E. Hanner, formerly known as Josephine E. Knight, and notice of sale of execution was duly given as required by law, as shown by the records in Case No. 49044, of which this Court can take judicial notice.

Thereafter, said property, Lots 17, 18, 19 and 20, WELLS PLACE, was sold at sheriff's sale as required by law on October 29, 1959, at which time the Plaintiff herein, Cecil DeMarcus, was the highest bidder and received a Certificate of Purchase. On April 2, 1962, almost two years after the redemption period had run, and no redemption made or attempted, the Sheriff issued his deed to the Plaintiff herein, Cecil DeMarcus, for the above-described real property. (See Exhibit B, attached hereto and made a part hereof)

All of these facts are matters of record in Case No. 49044, and cannot now be denied, and therefore must be taken as true. This action, now before the Court was commenced to quiet title to said Lots 17, 18, 19 and 20, WELLS PLACE, in Cecil DeMarcus, aka Harold DeMarcus and Rachel DeMarcus, his wife * * *

Respectfully submitted,

VANLANDINGHAM & STONEMAN

By JOHN VANLANDINGHAM
John Vanlandingham
Attorneys for Plaintiffs
5800 North 19th Avenue, Suite 202
Phoenix, Arizona

(TITLE OF COURT AND CAUSE)
MEMORANDUM IN RESPONSE TO
MOTION FOR SUMMARY JUDGMENT
(ORAL ARGUMENT REQUESTED)
(Filed 8/14/63)

Plaintiffs claim title to the property in question by virtue of a sale thereof made under a writ of execution issued out of the cause entitled "Hanner vs. Hanner" and numbered 49044 of the Superior Court of this county and state.

"Plaintiff must succeed on the strength of his own title and not on the weakness of that of his adversaries." *Berger vs. Bhend,* 79 A. 173; 285 P.2d 751, and prior Arizona cases

Plaintiffs rely upon Rule 53(A), RULES OF CIVIL PROCEDURE, which upon its face indicates that a writ of execution may issue to assist a Master in recovering his fees or compensation. They apparently assume that the rule is self-executing since plaintiffs were not a party in the case of Hanner vs. Hanner. Normally, an execution in this state only issues after a judgment in favor of the party seeking the writ. It is defined as a judicial writ issuing from the Court where the judgment is rendered, directed to an officer thereof and running against the body or goods of a party by which the judgment of the Court is enforced. *33 C.J.S. Sec. 1, page 133.*

"Except as may be otherwise provided by Statute, an execution cannot lawfully issue other than on a final judgment or decree pronounced by a competent Court which had determined the respective rights and liabilities of the parties to the action."

33 C.J.S. §5, Pg. 136

"An execution to be valid must have a valid judgment to support it."

33 C.J.S. §8, Pg. 141

"The fees of a Referee or Master are 'costs' to be fixed by the Court and taxed by the Clerk at the sum fixed."

U.S. vs. Bethlehem Steel Corp.
26 F.Supp. 259

In tracing the source of Rule 53(A), we find the revised Code of Arizona, 1928, Sec. 3880, provided as follows:

"3880. Compensation to Referee and Auditor. — The Court shall award such compensation to a Referee or Auditor as the parties may agree upon, and direct the payment according to the agreement of the parties. If no agreement be made, the Court shall fix the compensation of the Referee or Auditor and direct the manner of payment thereof, and the same shall be allowed and taxed as costs." [R.S. 1913, §671; rev., R.C. 1928, §3880.]

With the above authorities in mind, we seriously question whether Rule 53(A) is self-executing in this state, its having been the practice in this state to recover costs of an action through the successful party to the action for the benefit of the person who is entitled to the costs.

In addition to the assumption on the part of plaintiffs that Rule 53(A) is self-executing and that plaintiffs in this action can seize property and sell it under a writ of execution issuing from an action to which they were not parties, they further assume that plaintiffs strictly followed the Rule and gave to the defendants the "notice" required by the Rule. Plaintiffs pass this over lightly in their memorandum with the statement that they made demand upon the defendant, Josephine E. Hanner, formerly known as Josephine E. Knight, and plaintiff, Cecil DeMarcus, aka Harold DeMarcus, in his deposition admitted that all he did was to make a demand. He did not give any notice to the defendant that he would follow the strict requirements of the Rule and have a writ of execution issue if his compensation were not paid. Defendants deny that any such notice was given and therefore we do have a material issue of fact very vital in this case. Unless plaintiffs can prove a strict compliance with the Rule, they certainly could not acquire any title to the property in question. * * * *

The Court should also take judicial notice of the fact that the case of Hanner vs. Hanner is on appeal to the Supreme Court of the State of Arizona and has not been finally determined,

one of the issues on such appeal being whether the plaintiff or the defendant should pay the Master's fees. The Master's fees being costs, they would pend the determination of the case, as costs generally do.

Cecil DeMarcus, aka Harold DeMarcus, one of the plaintiffs, is a certified public accountant and had offices on the fifth floor of the Greater Arizona Savings Building during the time he had the writ of execution issued on September 18, 1959, and for some considerable time thereafter. Said plaintiff was constantly in touch with John M. Levy, one of the attorneys for Josephine E. Hanner, aka Josephine E. Knight, since he had to pass the door of Mr. Levy's office to get to his own on the same floor, and conversed with Mr. John Levy, in the presence of Mrs. Knight, and never at any time did the said Cecil DeMarcus make any mention of issuing an execution against the separate property of Josephine E. Hanner, aka Josephine E. Knight. In fact, it was a daily and sometimes several times daily occurrence that Cecil DeMarcus would be talking to the said John M. Levy from time to time until the said Cecil DeMarcus moved from the Greater Arizona Savings Building about the first of February, 1962, and even thereafter, the said Cecil DeMarcus met John M. Levy in Lindy's Restaurant on the ground floor of said building, and never at any time did he mention as to issuing a writ of execution. * * * *

JOHN M. LEVY
EMMETT R. FEIGHNER

By JOHN M. LEVY
ATTORNEYS FOR DEFENDANTS,
JOSEPHINE E. HANNER, aka
JOSEPHINE E. KNIGHT and
BETTY JO KNIGHT

(TITLE OF COURT AND CAUSE)
AFFIDAVIT OF JOSEPHINE E. HANNER and BETTY JO KNIGHT
(Filed 9/17/63)

STATE OF ARIZONA
} SS:
COUNTY OF MARICOPA

JOSEPHINE E. HANNER and BETTY JO KNIGHT, being first duly sworn upon oath depose and say:

Affiants state they are defendants in the above entitled action, and both are the record owners of the real property in question, to-wit:

Lots 17, 18, 19 and 20, WELLS PLACE, Maricopa County, State of Arizona,

said property being held in joint tenancy with rights of survivorship, which have been duly recorded in the office of the County Recorder of Maricopa County, State of Arizona, as set out in Page 5 of Defendants' Memorandum in Response to Motion for Summary Judgment.

Affiants allege that at no time did the plaintiffs make due *demand* upon these affiants for the payment as set out in the affidavit of Cecil DeMarcus, nor did these affiants receive any *notice* from the said Cecil DeMarcus or his agents or his attorney as required by Rule 53(A) Rules of Civil Procedure for the Superior Courts of the State of Arizona, which is a material issue of fact as to whether the *notice* required by said Rule 53(A) was given to these defendants by the plaintiff.

Affiants further allege that at no time did they receive any Notice from the Sheriff of Maricopa County, State of Arizona as to any execution issued out of the above entitled Court and did not receive any notice as to any Sheriff's sale of said Lots 17, 18, 19 and 20, Wells Place, Maricopa County, State of

Arizona; that the plaintiff, Cecil DeMarcus, knew at all times that the case of Hanner vs. Hanner was pending on appeal in the Supreme Court of the State of Arizona, and he also knew that one of the issues on such appeal was whether the plaintiff or the defendant should pay the master's fees, the master's fees being costs they would pend the determination of the said case on appeal, as costs generally do.

Affiants allege that the property in question is vacant land, and they have gone by the said property every day for many years, and at no time did affiants see any notices of Sheriff's sale on said property, and affiants further allege that they have paid all taxes from the years 1948 to 1960 on said property known as Lots 17, 18, 19 and 20, Wells Place, Maricopa County, Arizona.

/s/ JOSEPHINE E. HANNER

/s/ BETTY JO KNIGHT

Subscribed and sworn to before me this 16th day of September, 1963 by Josephine E. Hanner and Betty Jo Knight.

JOHN M. LEVY
Notary Public

My commission expires
January 17, 1967

Mailed a copy to Vanlandingham
& Stoneman

Attorneys for Plaintiffs, this
17th day of September, 1963
JOHN M. LEVY
Attorney for Defendants

(TITLE OF COURT AND CAUSE)

JUDGMENT

(Filed 11/18/63)

The above entitled matter came on for hearing on the 11th day of October, 1963, on Plaintiff's Motion for Summary Judgment. Plaintiff being present through their attorneys, Vanlandingham, Stoneman & Lynn, and the Defendants Barnd, Nesbitt, Knight and Josephine Hanner being present by their attorney, Emmett Feighner, Defendant Arthur E. Hanner being represented by Attorney James Struckmeyer.

WHEREUPON, Counsel were heard and the evidence presented, considered and the matter taken under advisement.

NOW, THEREFORE, the Court finds that there is no genuine issue as to any material fact and that the Plaintiffs are entitled to judgment as a matter of law, and that Plaintiffs' Motion for Summary Judgment is granted; that title to the within described real property is quieted in Plaintiffs, Cecil A. DeMarcus, also known as Harold DeMarcus and Rachel DeMarcus, his wife, to-wit:

> Lots 17 and 18, Wells Place, according to Book 40 of Maps, page 47, records of Maricopa County, Arizona;
> Lots 19 and 20, Wells Place, according to Book 40 of Maps, page 47, records of Maricopa County, except the West 25 feet thereof;

that the Plaintiffs recover possession of the premises herein described; that the adverse claims of the Defendants and each of them in the herein described real property are adjudged null and void, and that said Defendants are decreed to have no estate or interest in, or lien or encumbrance upon, said real property; that Defendants and any claimant claiming by, through or under said Defendants, or any of them, are forever barred and enjoined from further asserting any such claims; and that judgment is granted for Plaintiffs and against the Defendants, Betty Jo Knight, Josephine E. Hanner, Glenn A. Nesbitt and Gladys Barnd, and each of them, for the sum of Two Thousand Dollars

($2,000.00), as and for Plaintiffs' Attorneys' fees, for costs of suit herein incurred.

DONE IN OPEN COURT this 18th day of November, 1963.

JACK D. HAYS
JUDGE

(TITLE OF COURT AND CAUSE)
MOTION FOR NEW TRIAL
(ORAL ARGUMENT REQUESTED)
(Filed 11/26/63)

COME NOW the defendants, BETTY JO KNIGHT, JOSEPHINE E. HANNER, formerly known as Josephine E. Knight, GLENN A. NESBITT and GLADYS BARND, by and through their attorneys, JOHN M. LEVY and EMMETT R. FEIGHNER, and move the Court for an order vacating and setting aside the findings and judgment made, filed and entered herein, and that a new trial be granted upon the following grounds, to-wit:

The Judgment is not justified by the evidence and is contrary to law, because:

* * * * 5. Rule 53(A), upon which plaintiffs rely, and upon which they rely as a foundation for their alleged chain of title, is not self-executing and requires some action and proceedings by the claimant thereunder establishing the fact of notice and expiration of time fixed by the judgment and whereby the master would become a party to the action; otherwise, it would violate Article II, Section 5 of the Constitution of Arizona and Amendment V of the Constitution of the United States, denying the right to deprive a person of property without due process of law.

6. Rule 53(A), insofar as it provides for the issuance of an execution to enforce the payment of master's fees, is so vague and uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application and thereby violates Article II, Section 4 of the Constitution of Arizona and

Amendment V of the Constitution of the United States denying the right to deprive a person of property without due process of law. * * * *

JOHN M. LEVY—EMMETT R. FEIGHNER

By EMMETT R. FEIGHNER
Attorneys for Defendants, Betty Jo Knight, Josephine E. Hanner, Glenn A. Nesbitt and Gladys Barnd

(TITLE OF COURT AND CAUSE)

NOTICE OF APPEAL

(Filed 1/18/64)

NOTICE IS HEREBY GIVEN that the defendants, BETTY JO KNIGHT, JOSEPHINE E. HANNER, formerly known as Josephine E. Knight, GLENN A. NESBITT and GLADYS BARND, in Cause No. 145140, Maricopa County, State of Arizona, appeal to the Supreme Court of the State of Arizona from that judgment against said defendants, rendered therein on the 18th day of November, 1963, filed and docketed in the Office of the Clerk of the Superior Court of Maricopa County, State of Arizona, on the 18th day of November, 1963, wherein judgment was rendered in favor of said plaintiffs and against said defendants in said cause, and from the whole of said judgment, and from the order overruling and denying said defendants' Motion for New Trial, which Motion was made and filed in the Office of the Clerk of the Superior Court of Maricopa County, Arizona, on the 26th day of November, 1963, and which order overruling said defendants' Motion for New Trial was made and

entered in said cause on the 6th day of December, 1963, and from all the intermediate orders and rulings of the Court in said cause.

DATED at Phoenix, Arizona, this 13th day of December, 1963.

JOHN M. LEVY—EMMETT R. FEIGHNER

By EMMETT R. FEIGHNER
ATTORNEYS FOR DEFENDANTS BETTY JO KNIGHT, JOSEPHINE E. HANNER, formerly known as Josephine E. Knight, GLENN A. NESBITT and GLADYS BARND

IN THE

Supreme Court of the State of Arizona

In Division

BETTY JO KNIGHT, et al, Appellants, CECIL DEMARCUS, et ux, Appellees.		No. 8228

Appeal from the Superior Court of Maricopa County
Honorable Jack D. H. Hays, Judge
Affirmed.

JOHN M. LEVY, Phoenix
EMMETT R. FEIGHNER, Phoenix (deceased)
Attorneys for Appellants.

VANLANDINGHAM, STONEMAN & LYNN, Phoenix,
MAX M. KLASS, Phoenix
Attorneys for Appellees.

BERNSTEIN, Chief Justice

Plaintiff, Cecil DeMarcus, brought a quiet title action in the Superior Court of Maricopa County. From an order granting plaintiff a summary judgment, defendants appeal.

Cecil DeMarcus acted as special master in a divorce action involving appellant Josephine Hanner, Superior Court case No. 49044, and was awarded a fee of $5,072.10 for his services. Rule 53(a), Rules of Civil Procedure, A.R.S. 16. This award was subsequently affirmed by this court in Hanner v. Hanner, 95 Ariz. 191, 388 P.2d 239,[1] in which we held that the trial

[1]This decision not being rendered until after the quiet title action had been brought in the Superior Court. (Footnote in the original)

court was properly acting within its discretion in ordering Josephine Hanner, defendant both in the divorce action and the present quiet title action, to pay the master's fee.

The fee had been set by the lower court in June 1959, but remained unpaid in September of the same year when the plaintiff, DeMarcus, secured an execution against the property presently in question. A sale following the execution was made in October and the property was purchased by the plaintiff for a price approximately equal to the judgment.

In April of 1962 a sheriff's deed was issued to DeMarcus, and it is on the basis of this deed that he now seeks to quiet title in the described property. The named defendants are Josephine Hanner, Betty Jo Knight (daughter of Josephine Hanner) and two creditors, Glenn Nesbitt and Gladys Barnd who claim a lien interest in the land. On plaintiff's motion, the trial court granted him a summary judgment and subsequently denied the defendants' motion for a new trial.

Rule 56(e), Rules of Civil Procedure, A.R.S. 16 provides that once a motion for summary judgment has been made and supported, the adverse party must answer in detail as specific as that of the moving papers or else summary judgment will be entered against him. Because plaintiff's deposition and affidavits presented a prima facie case for quiet title (infra), Lujan v. MacMurtrie, 94 Ariz. 273, 383 P.2d 187, and because defendants Nesbitt and Barnd failed to answer with opposing affidavits, we conclude that summary judgment was properly entered against them. We turn now to a consideration of the summary judgment granted against defendants Josephine Hanner and Betty Jo Knight.

Summary judgment may be properly granted when, one, the pleadings, depositions, and affidavits present no genuine issue as to any material fact and, two, the moving party is entitled to a judgment as a matter of law. Rule 56(c), Rules of Civil Procedure, A.R.S. 16. Defendants present several reasons why they think summary judgment was improvidently granted in the present case, these being discussed below.

First, defendants contend that plaintiff's affidavit was defective because it fails to state it was made upon his personal knowledge and because neither the affidavit nor the attached exhibits were sworn to or certified. We have previously held that when, as here, the contents of an affidavit show that its material parts are statements of the affiant's personal knowledge, it is unnecessary to specifically state that the statements therein are a part of the affiant's personal knowledge. Hoffer v. Wetzel, 95 Ariz. 384, 390 P.2d 911.

Likewise we held in Hoffer v. Wetzel, supra, that failure to certify or swear to exhibits or affidavits is not a jurisdictional defect and that an objection in this respect may be waived. Since no objection for failure to comply with this required formality was raised while the lower court was considering the motion for summary judgment, we deem the objection to have been waived. Moreover, it would be purposeless, under the circumstances, to send the case back to the trial court for the sole purpose of having plaintiff correct the errors in his affidavit. See Colby v. Bank of Douglas, 91 Ariz. 85, 370 P.2d 56.

Secondly, defendants contend that there were several issues of fact that should properly have prevented the summary judgment. First of these issues advanced by the defendants is whether the plaintiff had given defendants "notice" of his intention to execute on the property in question. They argue that Rule 53(a), Rules of Civil Procedure, A.S.R. 16 imposes such a notice requirement. We disagree. The pertinent portion of that rule is as follows:

> ". . . (W)hen the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

A cursory reading of the rule makes it evident that the word "notice" refers to a notice to the debtor of his obligation and that the rule does not then further require a notice of an intent to execute, once notification of the judgment is properly given. Therefore whether or not defendants had notice of the intended

execution is immaterial and does not stand in the way of a summary judgment. Maloy v. Taylor, 86 Ariz. 356, 346 P.2d 1086.

Defendants further contend that the question of whether the property executed was held in joint tenancy between defendants Josephine Hanner and Betty Jo Knight, was a material issue of fact. This matter could be material only to Betty Jo Knight who was not a party to the Hanner v. Hanner action, supra, and she specifically disclaimed, under oath, any interest in the property. The following is taken from the Supplemental Abstract of Record:

"Q. Do you have a claim or did you ever claim any interest in those lots?

"A. (Betty Jo Knight): No, sir."

In addition the following comes from an examination of Josephine Hanner:

"Q. Mrs. Hanner, your daughter testified she has no interest in those lots, isn't that correct?

"A. You mean that she bought the interest, or something of that sort?

"Q. You heard her testimony that she had no interest in that property described in that Exhibit?

"A. She would if I died; they would belong to her.

"Q. But at the moment as far as you are concerned and she is concerned--

"A. They are mine, my lots."

Rule 53(a), supra, providing for the appointment and compensation of special masters is clear in its terms. If the compensation is not paid, the rule provides a means by which payment may be secured. We disagree with defendant's contention that this method is either vague or lacking in the protections guaranteed by the due process clauses of either the Arizona or Federal Constitutions.

Neither do we agree with defendants' claim that such compensation is in the nature of "costs" and that payment thereof should be suspended pending appeal. If the defendants wished to

stay execution of the judgment rendered against Josephine Hanner, pending appeal, this could easily have been accomplished by filing a supersedeas bond in accordance with Rules 62(d) and 73(k), Rules of Civil Procedure, A.R.S. 16. This, however, was not done.

We conclude that the plaintiff acted entirely within his rights as prescribed by statute. He was awarded a reasonable compensation for his services and was not paid. As a result, he sought relief in a manner provided by statute for persons in his exact position. Similarly, we conclude under the circumstances, contrary to defendants' urgings, that the plaintiff did not act adversely to notions of equity in executing against the particular property in question, despite indications that it was worth considerably more than the judgment. In the first place, it was reasonable for the plaintiff to assume that the property in question was the only suitable separate property of Josephine Hanner upon which to execute, and that it was naturally preferable to execute against it as opposed to property she held in community. In the second place, defendant was nevertheless free, for a period of six months, to exercise her statutory equity of redemption as a means of preserving her interest in the property. A.R.S. §§12-1281 — 12-1289. Again, defendant neglected to use the appropriate remedy.

Judgment affirmed.

CHARLES C. BERNSTEIN, Chief Justice

CONCURRING:

ERNEST W. MCFARLAND, Vice Chief Justice

JESSE A. UDALL, Justice

IN THE SUPREME COURT
OF THE
STATE OF ARIZONA

BETTY JO KNIGHT, et als, Appellants, vs. CECIL DeMARCUS, et ux, Appellees.	No. 8228 MOTION FOR REHEARING

COMES NOW the Appellant by her attorneys and respectfull moves that the Court grant a rehearing in this matter or, in the alternative, remand this matter back to the trial court for a hearing on the merits and, further in the alternative, that this Court reverse its original decision and find for the Appellant or for such other relief as to the Court seems fair and equitable under the circumstances.

This motion is based on three major points which, it is submitted, this Court failed to consider fully, namely (1) the failure of the master to give notice of his intention to execute, (2) the defects in the levy itself, and (3) the improvident granting of the motion for summary judgment.

In respect to point (1) above, we have carefully read the case of *Maloy* v. *Taylor,* 86 Ariz. 356, 346 P.2d 1086, cited by the Court as authority for the fact that notice of an execution does not have to be given by the master, and with all due respect to the Court, we cannot find any place in the cited case that gives authority for this position.

Counsel for Appellants have made a thorough search for a case in point and call to the Court's attention the case of *Cutting* v. *Van Fleet,* 252 Fed. 100, which was decided when Equity Rule 68 was in force. As appears from the reading of that case,

the phrase "attachment for the amount against the party" means a body attachment. The Court held that the remedy is a contempt proceeding and that whether or not an order to show cause should first issue is one that rests in the discretion of the Court. In that case a copy of the order was mailed to Cutting's attorney and later the master, by letter, informed Cutting (the delinquent party) of the purpose of the order and that if not obeyed the Court would be asked to issue an attachment. Later the marshall served upon Cutting a duly certified copy of the order, and after that an attachment was issued, the order not having been obeyed. The Court concluded that discretion had not been abused for the Appellant had due notice and had made his appearance to show cause.

The nature of Equity Rule 68 is explained in this quote from *Cutting* v. *Van Fleet, supra,* as follows:

> "The answer to the appellant's contention is that the order here made is not for the benefit of a party to the suit, and is not of the character of a judgment or decree for the payment of money, or a debt found due to the master. The proceeding is in contempt for refusal to obey an order of the court. The obligation to pay does not arise out of contract. It rests solely upon the order of the court. It operates upon the appellant in personam. Samuel v. Dodd, 142 Fed. 68, 73 C.C.A. 254; Meeks v. State, 80 Ark. 579, 98 S.W. 278; Wightman v. Wightman, 45 Ill. 167; Carlton v. Carlton, 44 Ga. 215. Rule 68 has taken away the right of the master to hold his report until the payment of his compensation, and has given him in lieu thereof the right to the remedy of attachment. The power to order payment of the master's compensation is essential to the court's procedure, and to the timely exercise of its functions. In 13 C. J. 87, it is said:
>
> > 'Inasmuch as the constitutional prohibition of imprisonment for debt does not take away the power of the judge to commit to jail for contempt, imprisonment to compel compliance with the mandate of a court, order, decree, etc., is generally authorized if defendant is financially able to comply therewith.' "

Arizona Rule of Civil Procedure 53(a), which concerns the

master's compensation and his remedy to obtain it was taken directly from Federal Laws of Civil Procedure 53(a), which in turn is a modification of Federal Equity Rule 68 in its original form. When Arizona adopted the Federal Rules of Civil Procedure it adopted the history and construction of the rules. *Harbel Oil Co.* v. *Steele*, 80 Ariz. 368, 298 P.2d 789. Historically, equity's jurisdiction at common law was in personam and the Courts of Equity enforced their decrees by use of their power of contempt. 27 Am.Jur.2d, Equity Sec. 515, p. 533, notes 2, 4. Federal Equity Rule 68 is simply a statement of the common law which existed at the time Federal Rule 68 was adopted. The text of the rule is as follows:

> "The District Courts may appoint standing masters in chancery in their respective district (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master pro hac vice in any particular case. The compensation to be allowed to every master shall be fixed by the District Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court."

It was carried over into Federal Rule of Procedure 53(a) in the following language, here quoted in the pertinent part:

> ". . . The master shall not retain his report as security for his compensation, but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

Our first problem is to determine what change, if any, was intended when the Equity Rule was incorporated into Rule 53(a) with the modification noted. The most important change is the substitution of the remedy of execution for that of attachment. It clearly appears that the phrase "attachment against the party" as

stated in the Federal Equity Rule meant a body attachment. The Advisory Committee on Rules, as set out in U.S.C.A., in the Committee's Commentaries to Federal Rules of Civil Procedure 53 stated the following:

> "It seemed best to the committee to make no startling changes in the existing practice, (as to reference) so the subject is covered by a single rule which merely attempts to clear up some of the most important obscurities that now exist."

In reviewing the foregoing history of A.R.C.P. 53(a), however, Appellants conclude that this rule provides for a body execution as the remedy to be used by a master who is unpaid. As appears in the commentaries under Federal Rule 53 in U.S.C.A., the Committee thought it best not to make any startling changes in the practice. It is submitted that an intent to change the remedy from that of contempt to an execution on property would be a rather startling change, especially when made in such ambiguous language. The more reasonable interpretation is that the Committee intended to retain contempt as the remedy to be enforced by a body execution, and that the word "execution" was used in an attempt to modernize the language. This is indicated by the commentaries above quoted and the language of the Rule itself which reads in part "execution against the delinquent party." It says plainly that the execution is against the party. If the Committee had meant property it could easily have said so.

The direction for payment of the master's fees is an order of the court sitting as a court of equity as distinguished from a judgment. The master is not a party to the case, but the court does have the power to make an order for his protection in his fees, having given up his right to retain the report as security. *Cutting* v. *Van Fleet, supra.*

The court has substituted another and stronger remedy on his behalf. This is analagous to the order which a court is empowered to make requiring a husband to pay a wife's attorney fees. Rule 53 provides for a return of execution against the delinquent party, which we submit is the exclusive remedy available to the Referee and means a body execution.

Most assuredly, if the master's remedy is a body execution, due process requires that the delinquent party be given notice of intention to resort to that remedy before it is actually carried out, so that he my have an opportunity to show cause, if any there might be, why the execution should not be carried out, analagous to civil contempt. *Philippe* v. *Winslow Glass Cutters League of America,* 99 F. Supp. 369; *Parker* v. *United States,* 153 F.2d 66, 163 A.L.R. 379; Article 2, Section 4, Constitution of the State of Arizona; Amendment 5, Constitution of the United States of America.

Assuming for the sake of argument that the language contained in Rule 53(a) is construed to mean execution against the property of the delinquent party, the requirement of intention to execute is still inherent in Rule 53(a) by reason of its history. Again we observe that due process requires notice to a party before a body attachment is levied. This was the practice under Equity Rule 68. Inasmuch as Equity Rule 68 was taken into F.R.P. 53(a) and no startling changes made in the practice, it would appear that the Committee intended that the notice requirements remain the same even though the remedy might have been changed from that of contempt to that of execution against the property of the delinquent party.

This requirement makes sense in light of the relationship of the master in equity to the parties. While the master's duties require him to be absolutely impartial to either side, it also brings him into close and intimate contact with the parties in his endeavors to ascertain the nature of their financial affairs. The master conducts his investigation of the facts of the case on an informal and personal basis, which would normally lead the parties to an action to acquire a sense of trust and reliance in the integrity and fair dealings of the master. In this case the master had almost daily contact with Mrs. Hanner and her attorney, who officed on the same floor with the master. Furthermore, Mrs Hanner's attorney recommended the appointment of De Marcus as master, which indicates a high degree of confidence and trust in his integrity and sense of fairness. As the Court stated in *Citizens' State Bank* v.

McRoberts, 29 Ariz. 173, 239 Pac. 1028, 1030, ". . . we think in fairness such agents should have seen her personally and told her . . . what steps they contemplated taking against her property; somewhere along the line and before the right of redemption expired they should have informed her of the situation."

The failure of the master in this case to advise of his intention to run the execution or to advise Mrs. Hanner anywhere along the line that he had executed and that her rights were passing by default was not merely oversight. He had frequent opportunities to mention this to her and her attorney, but he consciously refrained from giving either of them any indication of the situation he had developed. Deposition of Cecil De Marcus, taken on August 1, 1963, 3:00 o'clock p.m., in the office of John M. Levy, Mr. Levy asking the questions, Mr. De Marcus making the answers:

"Q. Did you talk to Mrs. Hanner from time to time?
A. Yes.
Q. Before the judgment and after the judgment?
A. Yes.
Q. You talked to me about it?
A. Yes.
Q. In about September the 18th, 1959, about three months thereafter, you issued an execution against Lots 17, 18, 19, and 20, Wells Place?
A. If that is the date, I suppose that is right.
Q. And you were still officing in this building?
A. Yes.
Q. The Greater Arizona Savings & Loan Association Building?
A. Yes.
Q. Did you ever tell me about the execution?
A. I don't think so.
Q. Why?
A. Oh, I didn't want to get into any arguments or anything as to whether I should or should not do it.
Q. Did you ever talk to Mrs. Hanner about it?
A. No."

At this point the delinquencies of the master in failing to give notice of his intention to run the execution naturally brings us into consideration of the second major point of this brief, which concerns itself with the defects in the levy itself. There were two points in the levy at which fatal defects occurred. The first point was the failure of the sheriff to levy upon known or readily ascertainable personal property belonging to Mrs. Hanner before resorting to levy upon her real estate. *Blasingame* v. *Wallace,* 32 Ariz. 580, 261 Pac. 42; *Mortensen v. Berzell Investment Co.,* 2 Ariz. App. 571, 410 P.2d 689.

By reason of his position as officer of the Court and the peculiar nature of his duties under the terms of his appointment, the master in this case was undoubtedly acquainted with the financial affairs of Mrs Hanner. He knew, because it was his duty to determine such matters, that the four lots upon which he caused the sheriff to levy were worth by his own estimation $20,000, a sum between three and four times as much as the amount of his claim. He nevertheless caused all four lots to be put up for auction and bid them in at the sheriff's sale at the amount of his claim. He also knew by reason of his investigations of the affairs of Mrs. Hanner, pursuant to his appointment, that she had personal property available for levy and execution which far exceeded the amount of his claim. Yet it appears from the sheriff's return that a levy was made on the real property in question without first applying any part of Mrs. Hanner's personal property. According to the master's report to the court (see Schedule A-2), Mrs. Hanner owned contracts which were her sole and separate property, valued at $12,692.24. Furthermore, in Schedule A-3 there appear items such as owned furniture, an automobile, and bank accounts. Mrs. Hanner also owned at that time, as her separate property, a real estate and insurance business. All of these items were her personal property and were available for levy or execution. Moreover, after the decree of divorce was entered, Mrs. Hanner owned an undivided one-half interest (as a tenant in common with Mr. Hanner) in all of the personal property that was community property before the decree was entered. A.R.S. Sec. 25-318(d). Both the master and his attorney, who also represented Mr. Hanner in the divorce decree, were very much aware of the

availability of personal property belonging to Mrs. Hanner. Nevertheless they levied first on real property, even though the statute requires that the sheriff first resort to the judgment debtor's personal property in satisfaction of an execution. A levy on the personal property would have undoubtedly brought the whole matter to the attention of Mrs. Hanner and her attorney, because of the necessity of taking the personal property into possession of the sheriff, whereas the levy of an execution on her real property very likely would not come to her attention unless she happened to have a title search performed on that particular piece of real property, or unless she happened to be thumbing through the mountain of notices posted on the bulletin board at the Court House, or happened to be reading the notices in the Arizona Weekly Gazette, where such things are published —all of which are unlikely events.

The second point in which a fatal error in the levying execution occurred was when the sheriff failed to either make a demand upon Mrs. Hanner for payment of the amount of the judgment or, in the alternative, give her an opportunity to point out and designate property which she preferred having levied upon in satisfaction of the judgment in the event she failed to pay it.

A.R.S. Sec. 12-1562(B) provides that a judgment debtor point out to the levying officer the property he desires to be levied on, and if the officer deems it sufficient to satisfy the execution, he shall make a levy on no other property. This particular section requires the sheriff to at least contact the judgment debtor to determine whether he has a preference as to which property is levied upon.

This is a practical construction by the Sheriff's Office, an administrative agency, of the obvious requirement of the statute relating to executions. "The practical construction of a statute, or the meaning publicly given it by contemporary usage, is usually presumed to be the true one. It should not be disturbed, disregarded, or overturned, especially where all other suggested

constructions are at least as doubtful as the practical one adopted, except for cogent or convincing reasons, such as its contravention of the constitution, or unless it is clear that such construction is erroneous and operates to defeat the manifest purpose of the statute and the intention of the legislature as expressed by the language employed." 50 Am.Jur. Statutes Section, pages 309-310.

Without this practical construction, our statutes relating to levy upon real estate and the execution of the same would be repugnant to the due process provisions of the Arizona Constitution and the United States Constitution.

A.R.S. Sec. 12-1562(B) doesn't mean a thing if the levying officer can, at his option, make the levy upon real estate without a reasonable attempt to locate the judgment debtor. In fact, it would not have been at all difficult to locate the judgment debtor in this case, because she was listed in the 1959 Mullen-Kille City Directory for Phoenix, Arizona, at page 1315, as Josephine E. Hanner, giving her address as Apt. 5, Patio del Palms, 3645 North 15th Place, telephone AM 5-3413. In addition to that, both the master and his attorneys were acquainted with her daughter Betty Jo Knight, who figured prominently in the contested divorce decree. She was listed in the Metropolitan Phoenix Telephone Directory for January 1958 and in the January 1960 Metropolitan Phoenix Telephone Directory on page 212 as Betty Jo Knight, telephone number AL 2-4572. Naturally it could also be presumed that she was also in the 1959 telephone directory. However, counsel was unable to obtain a copy of same, due to the fact the 1959 telephone directory from the files of the Telephone Company was subpoenaed for court proceedings in Pima County. If it is available before this matter is decided, we will submit the page number where she was listed in the 1959 edition. Also, the master had in his personal possession Mrs. Hanner's telephone number at all times. See Affidavit of Josephine Hanner. The master and his attorneys were acquainted with Mr. Levy, Mrs. Hanner's attorney, and his telephone number.

Section 12-1562(B) is the only assurance written into the

statute that a judgment debtor will receive notice of an impending levy.

It certainly must be presumed that the sheriff or deputy sheriff who levies on real estate is required to make demand on the judgment debtor for the amount of the judgment and to ask the judgment debtor to point out what property he desires sold to satisfy the judgment, for without this the levy and sale of real estate on judgment would be a vicious statute not giving to the judgment debtor due process allowed him under Art. 2, Sec. 4, Constitution of the State of Arizona, and under Amendment V of the Constitution of the United States of America. The Court is familiar with, and can take judicial notice of, the custom followed by the Sheriff's Office to contact the judgment debtor either by mail or in person and demand the amount of debt.

Besides the many other points we have discussed with relation to the levy of the execution and the sale thereunder, it should be borne in mind that this Court has, on the ground of inadequecy in the amount of bid with relation to value of property, set aside the sheriff's sale. *McCoy* v. *Brooks,* 9 Ariz. 157, 80 Pac. 365; *Citizens' Bank* v. *McRoberts,* 29 Ariz. 173, 239 Pac. 1028; *Redman* v. *White,* 85 Ariz. 82, 331 P.2d 1096.

On the basis of the lowest figure set by Appellee, the property is worth $20,000 which would mean 25% bid. On the figure contended by Mrs. Hanner, the property is worth $40,000.00, and the bid is 12½% of the true value. Affidavit of Josephine Hanner.

Mr. De Marcus was the master in equity in the case of *Hanner* v. *Hanner* and was an officer of the Court. He was placed in a position of trust and confidence, the duties of which gave him access to detailed and thorough knowledge of the financial affairs of the parties to the suit and placed him in a position which tended to engender a relationship of trust and confidence between him and the parties. As an officer of the court Mr. DeMarcus is charged with a standard of conduct in relation

to the parties in the action in the subject matter pending before the Court far more exacting than the standard of conduct imposed on a mere judgment creditor. It is submitted to the Court that the conduct on the master, in view of the light of all circumstances in the matter, fell far short of that required even of a mere judgment creditor. It is submitted that he took inequitable advantage of Josephine Hanner when he acquired her property worth many, many times the value of his claim under the circumstances of this case. It seems inconceivable that he could have honestly believed that this course of conduct was necessary to secure his compensation for acting as master in the case of *Hanner* v. *Hanner.*

At the least, the circumstances under which the levy was made raises a question of fact which ought to be tried out, which brings us to the final point—the propriety of granting summary judgment.

The Court's attention is called to *Elrick* v. *Rocklin,* 425 P.2d 103, March 15, 1967. The Court in that case laid down the strictest of requirements, and we quote:

> Rule 56(e) is explicit in requiring that 'Supporting and opposing affidavits shall be made on *personal knowledge,* shall set forth such *facts as would be admissible in evidence,* and shall show affirmatively that the affiant is competent to testify to the matters stated therein.' (Emphasis added.) Obviously merely in conclusions of ultimate facts as are permitted in pleadings and conclusions of law do not meet this test. 6 Moore's Federal Practice (2nd ed. 1953) Sec. 56.22 at 2328, and cases there cited. We feel that the affidavit of the defendant, Dave MacMurtrie, falls short of these standards. *A proper affidavit may require more effort than the pleadings themselves and should be prepared with as much care as if the affiant were testifying in court. The crucial function of the summary judgment as a final judgment on the merits of the case requires that the affidavit meet with the requirements of the rule.* (Emphasis supplied.)
>
> * * *
>
> Because of the determinative effect of a summary judgment upon the rights of litigants, we feel the following words of

caution are appropriate:

> We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy timesaving device. But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which the courts have been established. Denial of a trial on disputed facts is worse than delay. *** the district courts would do well to note that time has often been lost by reversal of summary judgments improperly entered.' Doehler Metal Furniture Co. 149 F.2d 130, 135." 94 Ariz. at 277, 278, 383 P.2d at 189, 190.

It would seem that the Elrick case is in conflict with the position which the Court has adopted in the instant case. The Court's attention is further called to the fact that there is no evidence at all in the affidavits concerning the reasonableness of the attorney fees of $2,000 awarded by the Court. This certainly is a question of fact which deserves to be tried out.

Betty Jo Knight in her affidavit states she has an interest as a joint tenant in the real property in question. Whatever she might have said in some other action to which she was a party no more than raises a question as to whether or not she does have an interest in the property. The quotations from the Hanner divorce case were a few statements taken out of context and were legal conclusions of a lay person. She could have been mistaken in that conclusion. The testimony in the Hanner divorce case seemed to be pointed toward the question of whether or not Betty Jo Knight paid money for an interest in the lots in question. It is submitted to the Court that one need not pay anything to obtain an interest in real propery, if it is acquired by gift. Mrs. Hanner in her testimony states certain conclusions which are contradictory in and of themselves. She states that Betty Jo Knight had no interest in the property, and at the same time she stated that the lots would be hers when she died. Again, this raises a conflict which can only be resolved by a

trial of these issues on the merits.

Similarly, there are claimed interests of Barnd and Nesbitt which were not foreclosed in *Hanner* v. *Hanner,* since they were not parties to that action either. Plaintiff's affidavits in the instant case do not state any facts which would militate against the existence of possible liens in favor of Barnd and Nesbitt. On the contrary, the Court can take judicial notice of the record in both cases and come to the conclusion that there were unrecorded liens against the lots in favor of those persons, which the master, by reason of his duties and position as master, in the divorce case, had actual notice. A judgment creditor does not take as an innocent purchaser. 33CJS Executions, Sec. 289, P. 582, notes 45 and 46. So the mere fact that he has a sheriff's deed in this case does not give him any priority over encumbrances, recorded or otherwise, which exist in favor of third parties and which he knows about. To cut off the claims of Betty Jo Knight, Barnd and Nesbitt, without a hearing on the merits, is to deprive them of their property without due process of law.

In the instant case the Court candidly admitted that all the provisions and technicalities concerning motions for summary judgment were not complied with. It would seem to us that under the *Rocklin* case, *supra,* that these matters and things could not be brushed aside; rather that the Court should require that this matter be reversed on that one point alone, and perhaps in the lower court, if necessary, the Appellants could raise other material issues of fact that could preclude the taking of a summary judgment. We earnestly contend that the allowing of the taking of a summary judgment without strict compliance with the rules and statutes appertaining thereto amount to the taking of propery without due process of law.

We urge that the Court read the deposition of the Appellee dated August 1, 1963, in which said deposition attorneys for Appellant, Mr. Levy and Mr. Feighner, asked the Appellee to accept his fees and mosts and all the moneys due him in lieu of keeping the real property for a smal part of its true value. The Appellee, Mr. DeMarcus, refused to accept the offer.

We attach herto, for the Court's consideration, to substantiate the matters and things set forth in the Motion, the Affidavit of the Attorney of Appellant during the lower court hearing and still attorney during this appeal, John M. Levy, the Affidavit of the Appellant, Josephine E. Hanner, and the Affidavit of the daughter of the Appellant, who was a party to the action, Betty Jo Knight.

We also attach herewith, in order to substantiate the matters and things contained in the Motion, the tax receipts, sewer assessment receipts, and leases with Foster & Kleiser for signs on the real property involved. Also in order to further substantiate the matters and things, we attach hereto a list of the personal property available for levy on September 18, 1959, the date of the issuance of the Writ of Execution, which list was extracted from the master's [Appellee] report. It should be kept in mind that we have only listed the personal property, and that there were several pieces of real property which could have been levied upon, in addition to the parcel levied upon in this matter.

The Court is invited to take judicial notice of the records of the Maricopa County Sheriff's Office with regard to the levy on Mrs. Hanner's real estate, which include the notes and memoranda of the levying officer. These records conclusively show that Mrs. Hanner was never personally contacted by any representative of the Sheriff's Office in regard to this Execution.

Counsel for Appellants have determined through checking titles that the Execution and sale in this matter should have excluded the west 25 feet of Lots 17 and 18, Wells Place, rather than the west 25 feet of Lots 19 and 20, Wells Place, the latter two lots being erroneous excluded in the judgment. Arthur Hanner in 1965, among properties conveyed to Mrs. Josephine Hanner by warranty deed, included the west 25 feet of Lots 17 and 18, Wells Place. This is another point of confusion in this proceeding where a trial on the merits would be of benefit to all parties concerned.

This being an equity case, to show good faith and absolute

sincerity on the part of the Appellant, we earnestly request that this Court order a rehearing or, preferably, a reversal of the Court's decision upon the condition that within ten days of the date of the Order the Appellant pay the Appellee all the monies due him for his services as a master and all the costs appertaining thereto. This would seem to be a fair and equitable solution rather than a harsh and inequitable conclusion of allowing a master, an officer of the court, who obtained knowledge concerning the property levied upon as an officer of the court, from keeping the said property for 12½% to 25% of its value. We in all sincerity make this offer and will comply with the same.

We respectfully urge that the Court grant oral argument on this Motion.

Respectfully submitted,
JOHN M. LEVY

RAYMOND R. WEIN
By: Raymond R. Wein

RAYMOND R. WEIN
Attorneys for Appellants

STATE OF ARIZONA }
County of Maricopa } ss.

JOHN M. LEVY, being first duly sworn, deposes and says:

THAT he is an attorney at law in the State of Arizona and that he has for the past several years been the attorney for the Appellant JOSEPHINE E. HANNER, also known as JOSEPHINE KNIGHT; that he was the attorney for the said Appellant both in her divorce proceedings, which was decided

by this Court, and in the present case, both in the lower court and in this Court;

THAT he has had his offices in the Heard Building, now known as the Greater Arizona Savings Building, on the fifth floor thereof, since about 1930 to date; that he recommended to the Court the appointment of Cecil DeMarcus as master in the divorce case, and that the said Cecil DeMarcus had his offices on the same floor as the Affiant for a long period prior to his appointment as master, moving from said floor on or about November 30, 1961; that after his appointment as master and during the time the divorce case was on appeal, and up to the time he moved from that floor, Mr. DeMarcus visited the offices of this Affiant concerning the status of the divorce case, and also saw Mrs. Hanner on many occasions during this period;

THAT he at no time made demand upon this Affiant for the payment of his fee, but stated that he would wait for the payment of his fee pending the final determination of the divorce proceedings; that he did not at any time inform the Affiant concerning the Writ of Execution, the basis of this lawsuit, and this Affiant had no knowledge of any kind or nature concerning the Execution until it was called to his attention by Mrs. Hanner, after the deed and tender had been received by Gladys Barnd.

THAT this Affiant states on oath that neither the Appellee, his attorneys, the sheriff or deputy sheriff, or any other person advised him concerning the Writ of Execution or asked him how to get in touch with the Appellant herein or made any demand upon him for payment of the judgment, and the entire transaction of the Writ of Execution, the running of the period of redemption, and during the entire period up to the time the quit claim deed and check for $5.00 were called to Mrs. Hanner's attention by Mrs. Barnd, this Affiant was unaware of the same; that this Affiant states that he was in Phoenix, Arizona, in his office on or about the 18th of September 1959, and during the months prior thereto and thereafter, and could have been informed regarding the matters and things stated herein; that this

Affiant knows of his own knowledge that had the Writ of Execution been called to the attention of this Affiant, that the Appellant JOSEPHINE E. HANNER could have within a matter of days raised the money to pay the judgment mentioned herein upon which the writ of execution was levied.

FURTHER AFFIANT SAYETH NOT.

John M. Levy
JOHN M. LEVY

SUBSCRIBED AND SWORN to before me this 9th day of May, 1967.

Elizabeth Knapp, Notary Public

My comm. expires Aug. 4, 1970.

STATE OF ARIZONA)
) SS:
County of Maricopa)

JOSEPHINE E. HANNER, formerly known as JOSEPHINE KNIGHT, being on oath duly sworn, deposes and says that she is the Appellant in this matter and that she states upon oath that Mr. DeMarcus on many occasions saw her in Mr. Levy's office and upon no occasion made a demand for the payment of his fee, and that he stated upon many occasions that he would wait until the final determination of the divorce proceedings in this Court for the payment of his fee; and Affiant relied upon Mr. DeMarcus' statement.

THAT this Affiant had no knowledge of any kind or nature from either the Appellee, his attorneys, sheriff or deputy sheriff, or any other person, of the issuance of the Writ of Execution and levy upon the real property, and received no communication, either by telephone or by mail concerning the same, although Mr. DeMarcus had her telephone number in connection with his duties as master herein; that she was fully unaware of the issuance of the Execution and levy thereon, the running of the time of redemption, until she was first advised by Mrs. Gladys

Barndt who called her to tell her she had received a quit claim deed for the real property involved and $5.00, under Section 12-1102 A.R.L., from the attorneys for Appellee, which was on or before November 17, 1962; and within a day or two thereafter similar deed and tender was received by Miss Glenn Nesbit, the Appellee Josephine E. Hanner, and Miss Betty Jo Knight.

THAT this Affiant forthwith through her attorney tried to get the Appellant to accept the judgment money rather than proceed with this action, but he refused to do so;

THAT this Affiant has lived since 1949 in Apt. 5, Patio del Palms, which was one of the properties gone into in great length in the divorce proceedings and was located directly behind the real property levied upon; that Mr. DeMarcus' employee Mr. Hughes had called upon Mrs. Hanner many times during the master's proceedings, and was fully aware of her address and telephone number;

THAT this Affiant states that had she known of the levy of the execution and the time running on the period of redemption, she would have within a few days paid off the said judgment.

This Affiant states that to her best knowledge and information she believes that the real property levied upon at the time of levy of execution was worth approximately $40,000; that she has paid the taxes and sewer assessments on the property from the time before and after the issuance of the Writ of Execution up to the present date on the real property levied upon, and has had a lease with Foster & Kleiser for two signs on said property and has received rental on same before the issuance of the writ and up to the present time from Foster & Kleiser and its successor, Eller Advertising Company, and is now receiving rent from same; that located upon said property is a laundry and storage room which has constantly been used by the Affiant before the Writ of Execution and up to the present date.

THAT this Affiant was in Phoenix on the date of the levy of the Writ of Execution, September 18, 1959, and for some period prior to that time and after that time and could have been

reached the day of the issuance of the writ and for a long period thereafter by either mail or telephone.

FURTHER AFFIANT SAYETH NOT.

Josephine E. Hanner
JOSEPHINE E. HANNER

SUBSCRIBED AND SWORN to before me this 9th day of May, 1967.

Vel Thorley, Notary Public
My Commission Expires
Oct. 27, 1968

STATE OF ARIZONA }
County of Maricopa } ss.

BETTY JO KNIGHT, being on oath duly sworn, deposes and says that she is the daughter of the Appellant JOSEPHINE E. HANNER, formerly known as Josephine Knight, and claims an interest in the real property levied upon in this cause;

THAT she at no time was informed, either by telephone or letter, nor was a message left with her nor mail sent to her mother in care of her, by either the Appellee, his attorneys, sheriff or deputy sheriff, or any other person, of the issuance of the Writ of Execution and the levy upon the real property;

THAT her name was on the pleadings in this action and that her name has appeared in the telephone directory as Betty Jo Knight, 121 West Granada Street, Phoenix, Arizona, telephone number AL 2-5472, for many years prior to 1959, during the year 1959, and up to the present date.

THAT this Affiant was in Phoenix on the day of the levy of the Writ of Execution, September 18, 1959, and for some period prior to that time and after that time, and could have been reached the day of the execution of the writ and for a long period

thereafter, by either mail or telephone.

This Affiant states that she had no knowledge of the Writ of Execution levied on the real property, the running of the period of redemption, nor any matter regarding the Writ of Execution until she was informed of same by her mother, which was on or about November 17, 1962; that within a day or two after she was informed by her mother she received a quit claim for the real property involved and $5.00, under Section 12-1102 A.R.L., from the attorneys for Appellee.

FURTHER AFFIANT SAYETH NOT.

Betty Jo Knight
BETTY JO KNIGHT

Val Thorley,
Notary Public

May, 1967.

My Commission Expires Oct. 27, 1968

STATEMENT OF ASSETS — 9-18-1959

Cash on Hand:

Bank Accounts	$1,500.00

Personal Property:

1956 Ford Station Wagon	$2,000.00
Furniture & Tools	$2,560.25

Notes & Contracts:

Schlarbaum, D.	$ 1,800.61
Herrd, Troy	$ 206.00
Cep, Philip	$ 799.00
Contracts	$17,284.99
	$26,150.85

IN THE SUPREME COURT OF THE
STATE OF ARIZONA

BETTY JO KNIGHT, et als, Appellants, vs CECIL DeMARCUS, et ux, Appellees	No. 8228 OBJECTION TO MOTION FOR REHEARING

COMES NOW the Appellee, by and through his attorneys and respectfully objects to the granting of a rehearing in this matter, or any other relief, for the reasons and on the grounds that the Motion does not set forth proper grounds upon which a rehearing may be granted.

The Motion presents and denominates three grounds upon the basis of which it is asserted a rehearing should be granted. In order they are:

1) That the notice requirement of Rule 53a was not complied with. This matter has been met squarely by the Supreme Court in its original decision and is therefore not a proper subject of rehearing. As a parasitic grounds to ground No. 1, Appellants assert that there was a misapprehension concerning the law in the respect that Rule 53a required a body attachment instead of permitting an execution on property as was had in the instant case. It is respectfully submitted that the authorities submitted by the Appellants themselves unequivocally refute their own position. In the case of *Cutting vs Van Fleet, 252 Fed. 100,* not only was the Court's action in support of the fee of a master held to be discretionary, but in that case it was held that the Appellant therein had notice and an order to show cause which served no useful purpose. Neither of the points presented in Appellant's first asserted reason for grounds for rehearing comport with the criteria for rehearing, to-wit; that the decision reached by the Court is based upon a mistake or misapprehension

as to some matter of record or that there was a clear mistake of law overlooking some precident from this Court or that the Court has failed to realize the full effect of the ruling.

2) The second ground asserted for the basis for rehearing by Appellants is that there were defects in the levy or in actions taken by the sheriff of Maricopa County.

It is respectfully submitted these matters were not included in Appellant's presentation to the Supreme Court on its original decision and therefore have no proper place in a Motion for Rehearing. *Climate Control Inc. vs Hill, 87 Arizona 2013, 49 P2d 771.* It might be added gratuitously that the sheriff of Maricopa County is not a party to the action before the Court.

3) The third and "final ground" asserted by the Appellants as a reason for granting a rehearing is "the improvident granting of a summary judgment". As Appellee has respectfully pointed out concerning the first asserted grounds for a rehearing, the so called "improvident" granting of summary judgment has been briefed, argued, and determined and does not constitute a basis for rehearing. See Procedure on Rehearing, Charles C. Bernstein, 5 Arizona Law Review, 175, 189 (1964).

It is respectfully submitted that there is no basis in law or under Court rule for the requested argument on the motion and that Appellants requested argument should be denied and Appellant should have no relief under his Motion for Rehearing.

Respectfully submitted,

MAX M. KLASS
Max M. Klass

RONALD CARMICHAEL
Ronald Carmichael

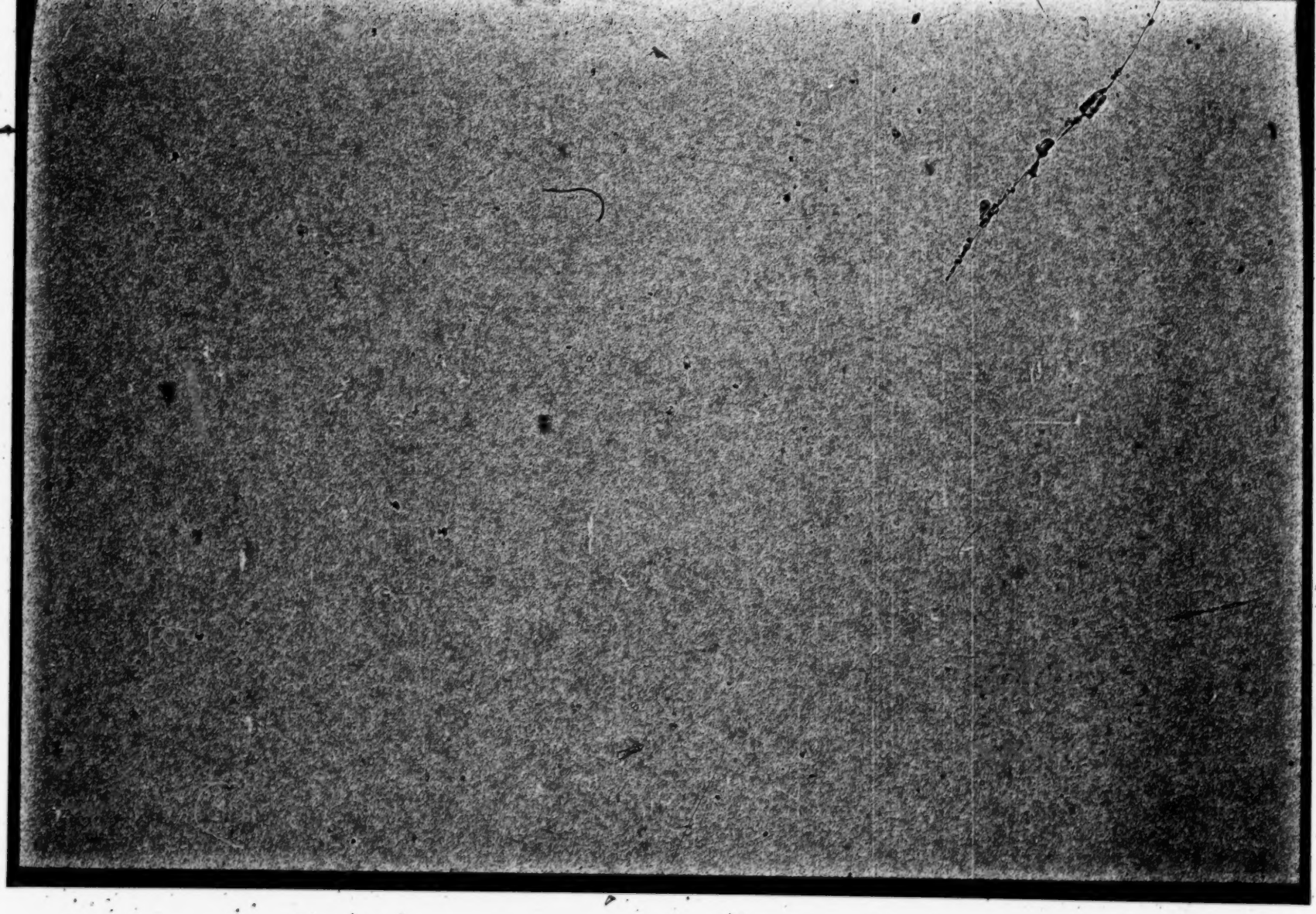
SUPREME COURT
STATE OF ARIZONA
PHOENIX
May 24, 1967

BETTY JO KNIGHT, et al, Appellants, v. CECIL DeMARCUS, et al, Appellees.	No. 8228

The following action was taken by the Supreme Court of the State of Arizona on Tuesday, May 23, 1967, in regard to the above-entitled cause:

"ORDER: Appellants' motion for rehearing—DENIED."

SYLVIA HAWKINSON, Clerk
By Lucile Brooks
Assistant Clerk



Supreme Court of the United States

No. 497 ----- , *October Term, 19* 67

Josephine Hanner,

Petitioner,

v.

Cecil DeMarcus, et ux.

ORDER ALLOWING CERTIORARI. Filed November 6 ----------, 19 67.

The petition herein for a writ of certiorari to the Supreme Court of the State of Arizona ----------

is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT, U. S.

No. 497

AUG 15 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

JOSEPHINE HANNER,

Petitioner,

v.

CECIL DEMARCUS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

OCTOBER TERM, 1966

PHILIP M. HAGGERTY
1220 Arizona Title Buiding
111 West Monroe
Phoenix, Arizona
Attorney for Petitioner

RAYMOND R. WEIN
1514 Arizona Title Bldg.
111 West Monroe
Phoenix, Arizona
Of Counsel

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AUTHORITIES

28 Va L. Rev. 261 11

IN THE

Supreme Court of the United States

JOSEPHINE HANNER, *Petitioner,* v. CECIL DEMARCUS, *Respondent.*	PETITION FOR WRIT OF CERTIORARI OCTOBER TERM, 1966

PHILIP M. HAGGERTY
1220 Arizona Title Buiding
111 West Monroe
Phoenix, Arizona
Attorney for Petitioner

RAYMOND R. WEIN
1514 Arizona Title Bldg.
111 West Monroe
Phoenix, Arizona
Of Counsel

COMES NOW your petitioner herein, Josephine Hanner, by and through her counsel, Philip M. Haggerty of the State of Arizona and a member of the bar of this Court, and respectfully petitions the Court to issue its Writ of Certiorari to the Supreme Court of the State of Arizona to review the decision of that court in the cause entitled, "BETTY JO KNIGHT et al, Appellants, v. CECIL DeMARCUS, Appellee", Cause No. 8228.

A. DECISION SOUGHT TO BE REVIEWED.

The decision sought to be reviewed is entitled, "BETTY JO KNIGHT, et al v. CECIL DeMARCUS", No. 8228, Supreme Court, State of Arizona. It is reported at 102 Ariz....., 425 P.2d 837. The text of the opinion is reproduced as Appendix A hereof.

B. GROUNDS UPON WHICH REVIEW IS SOUGHT.

1. The opinion of the Supreme Court of Arizona was rendered on March 29, 1967.

2. Petitioner's motion for rehearing was denied on May 23, 1967.

3. The jurisdiction of this Court is founded on 28 U.S.C. 1257 (3).

C. QUESTIONS PRESENTED FOR REVIEW.

I

Is it a violation of the provisions of Section 1, Amendment XIV to the Constitution of the United States for a state court to approve and enforce a procedure by which an officer of the court, to wit, a special master appointed by the court, may execute upon the property of a party appearing before him and purchase said property at execution sale without actual notice to the party-property owner of either intention to execute, execution, or sale?

II

Is it a violation of the provisions of Section 1, Amendment XIV to the Constitution of the United States to approve and enforce a law by which such an officer of the court and special

master may retain the benefit of ownership of such property by an execution sale, where the evidence of the real value of that property, which evidence was obtained by said special master in the performance of his official duties, shows the property to be worth between four and eight times the amount awarded said special master as his compensation?

III

Where a judgment creditor who is an officer of the court is aware of personal property sufficient in value to satisfy his judgment against a party, and he fails to inform the levying officer of such property and directs specific execution against a certain piece of real property; and the levying officer makes no attempt to locate personal property or to inquire of the debtor which real property should be levied on, all in violation of the clear terms of the statutes relating to executions, is not such a violation of the statutes by two officers of the court, without notice to the debtor, a violation of the traditional notions of due process and fair play in contravention of Article 1 of Amendment XIV, Constitution of the United States?

D. CONSTITUTIONAL AND STATUTORY PROVISIONS.

Constitution of the United States

Section 1, Amendment XIV, Constitution of the United States:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

Statutes

Arizona Revised Statutes

ARS 12-1552: "A. Executions are either general or special.

1. A general execution is one which commands the officer to whom it is addressed to make the amount of the judg-

ment out of property of the judgment debtor without specifying the particular property.

2. A special execution is one which commands the officer to whom it is addressed to sell certain specific property, or to deliver certain real or personal property to the party adjudged to be entitled thereto:"

. . . .

ARS 12-1553:

"A general execution shall state the amount of the judgment and costs and the amount due thereon, and shall require the officer:

1. If the execution is against the property of the judgment debtor, to satisfy the judgment, with interest, out of the personal property of the debtor, and if sufficient personal property cannot be found, then out of his real property."

. . . .

ARS 12-1562:

"A. An officer shall execute a general execution against the property of a judgment debtor by levying on a sufficient amount of property, if there is a sufficient amount of such property, and collecting or selling the things in action and selling the other property and paying to the judgment creditor or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and costs shall be returned to the judgment debtor unless otherwise directed by an order of the court.

B. A judgment debtor may point out to the levying officer the property he desires to be levied on, and if the officer deems it sufficient to satisfy the execution, he shall make levy on no other property."

. . . .

Rules of Procedure

Rule 53, Arizona Rules of Civil Procedure

Federal Rules of Civil Procedure:

"53(a) Appointment and compensation. . . . As used in these Rules, the word 'master' includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such other parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation, but when the party ordered

to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

E. STATEMENT OF THE FACTS.

This case originated as a quiet title action involving certain land in Maricopa County, Arizona. The land was owned by petitioner, Josephine Hanner, and the action was brought by Cecil DeMarcus, respondent herein, against her, her daughter, Betty Jo Knight, and two other persons claiming lien interests in the land. Summary judgment was entered against all defendants. The matter was appealed to the Supreme Court of the State of Arizona, and the judgment of the trial court was affirmed. This petition is brought by Josephine Hanner only.

The quiet title action was an attempt by respondent, DeMarcus, to judicially establish his right to the land. His claim was based on a sheriff's deed, issued as a result of an execution and sale in which DeMarcus was the judgment creditor and purchaser.

Respondent is a certified public accountant who had been appointed as a Special Master of the Maricopa County Superior Court in a divorce action between the petitioner and her former husband; all pursuant to Rule 53, Arizona Rules of Civil Procedure. At the conclusion of the lower court divorce proceedings, DeMarcus was awarded as his fee the sum of $5,072.10, the full amount being charged to Mrs. Hanner. This judgment, Cause No. D-49044, Maricopa County Superior Court, was appealed to the Supreme Court of Arizona alleging as error, *inter alia,* the propriety of charging the entire master's fee to Mrs. Hanner. It was affirmed in all respects; *Hanner v. Hanner,* 95 Ariz. 191, 388 P. 2d 239. No issue is now taken with the decree of divorce, the amount of the master's fee, or the taxation of the fee to Mrs. Hanner.

The Special Master's fee was set in June of 1959. Although the taxing of the fee solely to Mrs. Hanner was appealed, no supersedeas bond was filed. In September of 1959, DeMarcus secured a general execution against the property in question,

which at that time was in the undisputed ownership of Mrs. Hanner. The sale at execution was held in October of 1959, and the property was purchased by the Special Master for the amount of his judgment. In April of 1962, a sheriff's deed was issued to DeMarcus, and on November 17, 1962, the action to quiet title was commenced in accordance with Arizona procedure by the tender of $5.00 to Mrs. Hanner with a demand that she execute a quit-claim deed to the property. The tender and demand were refused, and this action in quiet title followed.

Cecil DeMarcus, as Special Master, with the responsibility of ascertaining the property of Mr. and Mrs. Hanner and determining its status, or assisting the court to determine its status, as separate or community property, had access to all records concerning the property and knowledge of its value, status, location, and nature. He was acquainted with Mrs. Hanner, examined all her books and records, and discussed the matter with her, and even had some statements taken on deposition. He knew her then counsel, Mr. John Levy, occupying space in the same office building, and in fact even on the same floor as Mr. Levy until November of 1961. He had many conversations with Mr. Levy before and after the decree. No mention was made at any time of an execution to collect his fee, and the first notice to Mrs. Hanner of any claim by DeMarcus to the property was the tender of $5.00 and presentation of the quit-claim deed, in November of 1962. The office of the Sheriff of Maricopa County never communicated with Mrs. Hanner at any time in this matter. Evidence before the Special Master, which evidence was incorporated in his Master's report to the court, showed the land levied upon to be worth at least $20,000. Mrs. Hanner had claimed that it was worth in excess of $40,000. His records as Special Master also showed personal property of a value in excess of $12,000. No attempt was made to levy on this personal property, and no attempt was made by the Sheriff to have Mrs. Hanner point out property which she desired to be levied on. The quiet title action was decided in all respects in favor of Special Master DeMarcus and affirmed on appeal.

F. QUESTIONS OF CONSTITUTIONAL LAW WERE RAISED PRIOR TO THIS PETITION.

The issue of the failure of notice was raised by this petitioner's answer in the Superior Court-quiet title action, and the response to a motion for summary judgment. It was also specifically related to the Constitution of the United States in a motion for new trial filed in the same court. (Abstract of Record, Knight v. DeMarcus, No. 8228, pp. 11, 66, 76, 94-95). Constitutional issues were again specifically raised in the brief on appeal to the Supreme Court of the State of Arizona. (Assignment of Error No. VIII, pp. 22-23, Appellants' Opening Brief). The same issue was also raised and argued in Appellants' Motion for Rehearing before the Supreme Court of Arizona. (Motion for Reheating, pp. 10-11)

No opinion was written in the lower court, and neither the entry of summary judgment, the denial of the motion for new trial, nor the judgment recites argument or reason for the judgment beyond the bare formalities. In the Supreme Court opinion, the argument is treated in one sentence:

> "We disagree with defendants' contention that this method is either vague or lacking in the protections guaranteed by the due process clauses of either the Arizona or federal constitutions."

The order denying rehearing is merely that, and there is no elaboration.

H. ARGUMENT

Summary

The plea of Josephine Hanner is simple and clear.

> "Mr. DeMarcus is an officer of the court and almost a judge, he should have told me. As an officer of the court; he should not be allowed to make a tremendous profit on his Master's fee. As an officer of the court, he above all should follow the law. As an officer of the court, he should not use his inside information to make a profit and seriously injure one of the parties appearing before him."

The law demands that personal property be seized before real property be seized. (A.R.S. 12-1553 (1)) The law gave her

a right to point out and to select property to be levied upon. A.R.S. 12-1562(B)) The law states that Special Master is entitled to his fee, but not entitled to anything more than that. A litigant in a case expects and has a right to believe that he or she will be treated fairly by the court before which they appear.

But statutes were ignored, no notice was provided, and the Special Master, acting as an arm of the court and the alter ego of the trial judge, used his knowledge of the case and the parties before him to acquire valuable property far in excess of the value of his fees for a fraction of its worth. The whole affair shows not only an absence of equity, but a deliberate, calculated, and awesomely successful effort to deprive petitioner of her rights and is an affront to the traditional notions of due process and essential fair play heretofore so admirably protected by this Court.

We realize that the amount of the value of the land involved is not spectacular, but we believe there are issues which especially commend this case to the attention of the Court.

The parties are not just private litigants. The respondent was acting as a branch of the judicial arm of the government. The abuse of official power, especially judicial power, for private gain calls with special fervor for equitable redress by the very courts which created the power. Of equal importance is our prayer that notice be given when one's property is placed in jeopardy, and that statutes providing for the protection of debtors be followed so that the protection be meaningful and realistic. This element of notice has long been held by this Court to be an essential part of due process.

Of additional weight to support an acceptance of this matter is the fact that remedies of Special Masters in Arizona are an exact duplicate of those provided in federal law and in many states. There are few, if any, cases touching on this subject at all, and none since the Federal Rules of Civil Procedure have replaced the Equity Rules.

An Equity Master May Not Execute on the Property of Parties Appearing Before Him Without Notice.

A Master at Equity occupies a traditional position of long standing in courts of equity. Although the office has been abolished in some jurisdictions (*Killingstad v. Meigs*, 147 Wis. 511, 133 N.W. 632), many states have determined that their function can be useful and necessary in certain areas traditionally related to equity. The federal court system has likewise continued the use of masters. While a Special Master may not be said to sit upon the woolsack, he certainly acts under the aegis of the chancellor. As this Court has previously held:

> "He occupies a position of honor, responsibility and trust; the court looks to him to execute its decrees thoroughly, accurately, impartially, and in full response to the confidence extended; . . . The rights of those who ultimately pay must be carefully protected." *Newton v. Consolidated Gas Company of New York*, 259 U.S. 101 (1922)

See also *In re Gilbert*, 276 U.S. 6 (1928), to the effect that he has "the duties and obligations of a judicial officer".

And from lower federal courts, we find that "he should be a person fit to perform the duties incumbent upon one sitting in the place of the court". *Finance Committee v. Warren*, 82 Fed. 525 (7th Cir. 1897).

> "A Master is a public servant engaged in a public function. He is an aide to the court of his appointment. He is not a servant of the litigants or a servant of their attorneys." *Universal Oil Products Co. v. Hall*, 76 F.2d 258 (8th Cir. 1935), cert. denied 296 U.S. 621.

We find these dictates a little difficult to coincide with the activities of DeMarcus in this particular matter. His own report filed in the original divorce action, Maricopa County Superior Court No. D-49044, Exhibit A, shows a detailed analysis of the property owned by Mr. and Mrs. Hanner. The deposition of DeMarcus taken in the quiet title action, quoted in part in the motion for rehearing, shows that he communicated with Mrs. Hanner and with her attorney both before and after the judgment, and that he did not mention the execution because, "Oh, I

didn't want to get into any arguments over anything as to whether I should or should not do it". (Motion for Rehearing, p. 7).

His own report (Exhibit A) sets the value of the property in question at $20,000. There can be no doubt of the fact that DeMarcus could easily have informed Mrs. Hanner of the steps he was taking. He knew her attorney, her address, all the property she owned, in fact, far more than would be normal for an ordinary judgment creditor.

We realize it has been generally held, and with good reason, that where notice of an action was originally given, and a party has had his day in court, no special notice is required in supplementary proceedings to enforce a judgment obtained in the action. *Endicott-Johnson Corp. v. Encyclopedia Press,* 266 U.S. 285 (1924). However, that situation is inapplicable here for two basic reasons.

In the first instance, DeMarcus was not a "party" to the action for which he recovered a judgment. As a non-party to an action and, in fact, as one who had special duties of responsibility and fairness towards all of the parties in the action, we believe that fundamental concepts of fair play and equity demand that notice be given to a party before a Special Master executes against the property of that person.

In the second instance, there is considerable doubt as to whether the right of a Special Master under either Arizona Rule 53(a) or Federal Rule 53(a) to collect whatever fee may be awarded him can be directed against the property of a party involved, rather than against the party himself. The Rule specifically states that a Special Master may have "execution against the delinquent *party*". (Emphasis added) Nothing is mentioned about an execution against the *property* of the party. The use of the word "party" would imply notice to the person, as one may not execute against the person without actually having him brought before the court.

The present Rule 53 is an adoption in part from Equity Rule 68.

"It seemed best to the committee to make no startling changes in the existing practice, [as to reference] so the subject is

covered by a single rule which merely attempts to clear up some of the most important obscurities that now exist." 28 *Va.L.Rev.* 261.

The previous rule, Equity Rule 68, read in part: "attachment for the amount against the party."

The one explanation of this rule which is found in our body of federal jurisprudence appears to be *Cutting v. Van Fleet,* 252 Fed. 100 (9th Cir. 1900). There the court held that the remedy was by contempt proceedings, and that an order to show cause need not be issued before the party be found in contempt. In explaining the nature of the rule, the court held as follows:

"The answer to the appellant's contention is that the order here made is not for the benefit of a party to the suit, and is not of the character of a judgment or decree for the payment of money, or a debt found due to the master. The proceeding is in contempt for refusal to obey an order of the court. The obligation to pay does not arise out of contract. It rests solely upon the order of the court. It operates upon the appellant in personam. Samel v. Dodd, 142 Fed. 68, 73 CCA 254; Meeks v. State, 80 Ark. 579, 98 S.W. 378; Wightman v. Wightman, 45 Ill. 167; Carlton v. Carlton, 44 Ga. 215. Rule 68 has taken away the right of the master to hold his report until payment of his compensation and has given him in lieu thereof the right to the remedy of attachment."

The court then went on to hold that this did not constitute imprisonment for debt, as contempt of court was never held to be a deprivation of this constitutional protection.

Thus, the only change we have between the old Equity Rules and the present rule is a substitution of the word "execution" for "attachment". The phrase still is that either remedy is directed against "the party", not against any property of the party involved.

Proceedings in contempt, like all equity proceedings, are in personam, and may not be enforced without actually bringing the delinquent party before the court, in order to impose punishment for contempt. *Holt v. Virginia,* 381 U.S. 131 (1965); *In re Oliver,* 333 U.S. 257 (1948).

Since the Advisory Committee apparently intended no drastic changes or substantial changes in the old Equity Rules, but merely

attempted to correlate them into a better legislative pattern, we believe we can assume that the present rule is merely an extension of the old Equity Rule and that the remedy of a master who was not paid was to cite the party for contempt of court and execute upon his person.

If the promulgators of the Federal Rules wished to imply that the remedy was to be taken against the property of the debtor, it would have been a matter of the greatest simplicity to place the word "property" in the statute. But they left in the phrase "against the delinquent party".

The only conclusion which can be drawn is that those who recommended the rules and adopted them wish to continue the remedy to be a personal remedy against the delinquent party individually. Equity has always traditionally acted in personam, and this would be totally in accord with normal equitable practice.

The importance of this distinction lies in the fact that an action directed against a party for contempt would provide him with actual notice of the proceedings against him. Here there was no such actual notice. While it may be true that notices were posted on the bulletin boards outside the courthouse, and perhaps run by way of legal advertisement in the weekly newspaper devoted to such advertising, this would hardly constitute real or actual notice to the parties involved, within the meaning of *Holt* or *Oliver, supra.*

The law relating to the method by which a Special Master may secure his compensation has been set forth by the only federal court to consider the matter, *Cutting v. Van Fleet, supra,* to mean enforcement by contempt proceedings where there is actual notice to the alleged delinquent party. The relationship of a Special Master to the parties before him is a special relationship, and not one of merely an ordinary judgment creditor against a judgment debtor. The Special Master here deliberately avoided mentioning or giving any notice to Mrs. Hanner of his intention to seize her property. DeMarcus completely flouted the requirements of this Court that, as a Special Master, he holds "a position of honor, responsibility and trust".

The use of his position to effectuate a substantial private gain cannot, under any notions of due process, be tolerated.

The Seizure of Property in Excess of his Judgment Amounts to a Taking of Property Without Due Process.

While Mrs. Hanner contends that the property in question is worth approximately $40,000, we will content ourselves with the Special Master's report to the effect that it was worth $20,000. This report is quite extensive and shows a detailed analysis of all the property owned by Mrs. Hanner. (No. D-49044, Ex. A)

All of this information was obtained by DeMarcus in the performance of his official duties as a Special Master. This involved a detailed analysis of all the books and records kept by Mrs. Hanner concerning interests in a number of pieces of property, with a further analysis of the encumbrances which might be on each of them. While we do not doubt the fairness of his fee in the amount of $5,000, our conscience is shocked by the fact that he turned this $5,000 judgment into a $20,000 piece of property.

This Court in *Newton v. Consolidated Gas Co. of New York*, 259 U.S. 101, (1922) discussed, as other courts have discussed, the determination of the compensation of a Special Master. It also noted, as we have stated above, that "the rights of those who ultimately pay must be carefully protected". We fail to understand how the Supreme Court of Arizona can hold that $15,000 over and above the award constitutes careful protection of the parties involved. It is so gross as to shock the conscience of the Court. "His compensation should be liberal but not exorbitant." *Newton, supra.*

The Supreme Court of Arizona passed over the matter with a brief reference to the fact that Mrs. Hanner could have redeemed the property in accordance with the laws relating to redemptions by judgment debtors from execution sales. However, as we pointed out before, Mrs. Hanner had no notice of the execution or sale or issuance of the deed until long past the six months period of redemption.* If she had no notice, pray tell, how could she have redeemed the property?

---

*A.R.S. 12-1281

As we will point out in our third argument, we do not believe that the laws of the State of Arizona allow property to be seized without notice, under a writ of general execution. But we believe in this instance the Supreme Court allowed the enforcement of the law in such a way that gross inequity has been done to Mrs. Hanner, and that such a judicial interpretation constitutes an enforcement of the law whereby she was deprived of property without due process.

Such an underhanded use of his official knowledge and position by the Special Master is fortunately not common, as we have few cases on this subject. We have one possible parallel. In *Universal Oil Products Co. v. Hall*, 76 F.2d 258 (8th Cir. 1935), cert. denied 296 U.S. 621, while the master in that particular case was guilty of more than one act properly condemned, one of the factors called to the attention of the court which resulted in its ordering a refund of fees paid was the fact that the master in a patent proceedings of a somewhat complicated nature involving the oil cracking process, filed in his own name an application for patent in the same field, obviously using the information learned by him in the course of the litigation.

The true authority of courts is based largely upon the respect the litigants have for them and the trust they have that disputes will be fairly heard and judged. When an officer of the court uses his knowledge, authority, and position to effectuate a substantial personal gain for himself, all courts suffer, and the fabric of our social structure has received another damaging tear.

Where Laws Specifically Designed to Protect Judgment Debtors are not Followed and Are In Fact Evaded or Violated, a Judgment Debtor Who Loses Property Has Lost It Through a Violation of Due Process of Law.

We have set forth hereinabove the Arizona statutes relative to executions and sales. The law requires, and the writ itself sets forth the fact, that personal property must be seized before real property. The report of the Special Master shows personal property assets of Mrs. Hanner in excess of $12,000. He not only knew of these assets, but their nature and location.

The Supreme Court of Arizona in an earlier decision involving the same statute held the following:

> "But when there is no one concerned other than the parties to the judgment, the execution, and the sale, and the motion to vacate is made within a reasonable time, the sale may be set aside where it is shown that the judgment debtor had sufficient personal property which could have been applied on the judgment, and that the officer knew it, or by the exercise of reasonable diligence could have discovered it, and failed to levy upon it, but instead levied upon and sold for the amount of the judgment real property worth many times said sum." *Blasingame v. Wallace*, 32 Ariz. 582, 61 Pac. 42 (1927), at 32 Ariz. 586.

Here, obviously, the Sheriff did not use "reasonable diligence", because if he had merely inquired of the judgment creditor the existence of personal property was known to this creditor, and could have been disclosed. In any event, our principal action is against the creditor himself, and he withheld the information from the Sheriff or failed to notify him of the personal property. We do not believe DeMarcus can now claim the advantage of his own silence in an area in which he was well informed.

Beyond this, even if there were only real property available, Mrs. Hanner had the right under ARS 12-1562(B), *supra*, to point out to the levying officer the property she desired to be levied upon. This statute clearly implies actual notice to the parties against whom the judgment runs, because, if they do not know about it, how can they point it out to the Sheriff? The Supreme Court of Arizona made light of this argument and the argument that personal property must be seized prior to real property by holding in a rather casual manner the following:

> "In the first place, it was reasonable for the plaintiff to assume that the property in question was the only suitable separate property of Josephine Hanner upon which to execute and that it was naturally preferable to execute against it as opposed to property she held in community."

It held this in the face of the fact that the very judgment which gave DeMarcus his fee also divided the property into the separate property of each of the parties involved and stated which prop-

erty was separate and which property was community property. In essence, all the property, except an apartment house and a horse, were held to be the separate property of Josephine Hanner, and, if Mr. DeMarcus could read the judgment to determine his fee, he could read the judgment to determine which property was her separate property.

The requirements of the Arizona statute relative to the seizure of personal property first before real property is seized and the requirements that the debtor be afforded an opportunity to point out his property have been part of our statutes for many years. They were specifically recognized and enforced in *Blasingame v. Wallace, supra,* and even more recently recognized and approved in *Mortensen v. Berzell Investments Co.,* 2 Ariz. App. 571, 410 P.2d 689 (1966), where the Sheriff evidently personally contacted the judgment debtor and the judgment debtor was held to have failed to reveal personal property.

But in our case the Arizona Supreme Court evidently lost sight of the wisdom and equity of its position of forty years ago. The requirements of the statutes, the purposes behind them, and its own earlier language upon which Mrs. Hanner and her counsel had a right to rely were completely overlooked and ignored. The net result was a substantial loss of property without notice, and a substantial enrichment of an officer of the court who had a duty to protect all the parties before him.

CONCLUSION

It is respectfully submitted that such an act or activity cannot be tolerated, and that the decision of the Arizona Supreme Court requires reversal as constituting judicial approval of the seizure of the property of the petitioner herein without due process of law and in contravention of the Fourteenth Article of Amendment of the Constitution of the United States.

Respectfully submitted,

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Of Counsel

APPENDIX A

IN THE

Supreme Court of the State of Arizona

In Division

BETTY JO KNIGHT, et al, Appellants, CECIL DEMARCUS, et ux, Appellees.	No. 8228

Appeal from the Superior Court of Maricopa County
Honorable Jack D. H. Hays, Judge
Affirmed.

JOHN M. LEVY, Phoenix,
EMMETT R. FEIGHNER, Phoenix (deceased)
Attorneys for Appellants.
VANLANDINGHAM, STONEMAN & LYNN, Phoenix,
MAX M. KLASS, Phoenix
Attorneys for Appellees.

BERNSTEIN, Chief Justice

Plaintiff, Cecil DeMarcus, brought a quiet title action in the Superior Court of Maricopa County. From an order granting plaintiff a summary judgment, defendants appeal.

Cecil DeMarcus acted as special master in a divorce action involving appellant Josephine Hanner, Superior Court case No. 49044, and was awarded a fee of $5,072.10 for his services. Rule 53(a), Rules of Civil Procedure, A.R.S. 16. This award was subsequently affirmed by this court in Hanner v. Hanner, 95 Ariz. 191, 388 P.2d 239,[1] in which we held that the trial

[1]This decision not being rendered until after the quiet title action had been brought in the Superior Court. (Footnote in the original)

court was properly acting within its discretion in ordering Josephine Hanner, defendant both in the divorce action and the present quiet title action, to pay the master's fee.

The fee had been set by the lower court in June 1959, but remained unpaid in September of the same year when the plaintiff, DeMarcus, secured an execution against the property presently in question. A sale following the execution was made in October and the property was purchased by the plaintiff for a price approximately equal to the judgment.

In April of 1962 a sheriff's deed was issued to DeMarcus, and it is on the basis of this deed that he now seeks to quiet title in the described property. The named defendants are Josephine Hanner, Betty Jo Knight (daughter of Josehpine Hanner) and two creditors, Glenn Nesbitt and Gladys Barnd who claim a lien interest in the land. On plaintiff's motion, the trial court granted him a summary judgment and subsequently denied the defendants' motion for a new trial.

Rule 56(e), Rules of Civil Procedure, A.R.S. 16 provides that once a motion for summary judgment has been made and supported, the adverse party must answer in detail as specific as that of the moving papers or else summary judgment will be entered against him. Because plaintiff's deposition and affidavits presented a prima facie case for quiet title (infra), Lujan v. MacMurtrie, 94 Ariz. 273, 383 P.2d 187, and because defendants Nesbitt and Barnd failed to answer with opposing affidavits, we conclude that summary judgment was properly entered against them. We turn now to a consideration of the summary judgment granted against defendants Josephine Hanner and Betty Jo Knight.

Summary judgment may be properly granted when, one, the pleadings, depositions, and affidavits present no genuine issue as to any material fact and, two, the moving party is entitled to a judgment as a matter of law. Rule 56(c), Rules of Civil Procedure, A.R.S. 16. Defendants present several reasons why they think summary judgment was improvidently granted in the present case, these being discussed below.

First, defendants contend that plaintiff's affidavit was defective

because it fails to state it was made upon his personal knowledge and because neither the affidavit nor the attached exhibits were sworn to or certified. We have previously held that when, as here, the contents of an affidavit show that its material parts are statements of the affiant's personal knowledge, it is unnecessary to specifically state that the statements therein are a part of the affiant's personal knowledge. Hoffer v. Wetzel, 95 Ariz. 384, 390 P.2d 911.

Likewise we held in Hoffer v. Wetzel, supra, that failure to certify or swear to exhibits or affidavits is not a jurisdictional defect and that an objection in this respect may be waived. Since no objection for failure to comply with this required formality was raised while the lower court was considering the motion for summary judgment, we deem the objection to have been waived. Moreover, it would be purposeless, under the circumstances, to send the case back to the trial court for the sole purpose of having plaintiff correct the errors in his affidavit. See Colby v. Bank of Douglas, 91 Ariz. 85, 370 P.2d 56.

Secondly, defendants contend that there were several issues of fact that should properly have prevented the summary judgment. First of these issues advanced by the defendants is whether the plaintiff had given defendants "notice" of his intention to execute on the property in question. They argue that Rule 53(a), Rules of Civil Procedure, A.S.R. 16 imposes such a notice requirement. We disagree. The pertinent portion of that rule is as follows:

> ". . . (W)hen the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

A cursory reading of the rule makes it evident that the word "notice" refers to a notice to the debtor of his obligation and that the rule does not then further require a notice of an intent to execute, once notification of the judgment is properly given. Therefore whether or not defendants had notice of the intended execution is immaterial and does not stand in the way of a summary judgment. Maloy v. Taylor, 86 Ariz. 356, 346 P.2d 1086.

Defendants further contend that the question of whether the property executed was held in joint tenancy between defendants Josephine Hanner and Betty Jo Knight, was a material issue of fact. This matter could be material only to Betty Jo Knight who was not a party to the Hanner v. Hanner action, supra, and she specifically disclaimed, under oath, any interest in the property. The following is taken from the Supplemental Abstract of Record:

"Q. Do you have a claim or did you ever claim any interest in those lots?

"A. (Betty Jo Knight): No, sir."

In addition the following comes from an examination of Josephine Hanner:

"Q. Mrs. Hanner, your daughter testified she has no interest in those lots, isn't that correct?

"A. You mean that she bought the interest, or something of that sort?

"Q. You heard her testimony that she had no interest in that property described in that Exhibit?

"A. She would if I died; they would belong to her.

"Q. But at the moment as far as you are concerned and she is concerned - -

"A. They are mine, my lots."

Rule 53(a), supra, providing for the appointment and compensation of special masters is clear in its terms. If the compensation is not paid, the rule provides a means by which payment may be secured. We disagree with defendant's contention that this method is either vague or lacking in the protections guaranteed by the due process clauses of either the Arizona or Federal Constitutions.

Neither do we agree with defendants' claim that such compensation is in the nature of "costs" and that payment thereof should be suspended pending appeal. If the defendants wished to stay execution of the judgment rendered against Josephine Hanner, pending appeal, this could easily have been accomplished by filing a supersedeas bond in accordance with Rules 62(d) and

73(k), Rules of Civil Procedure, A.R.S. 16. This, however, was not done.

We conclude that the plaintiff acted entirely within his rights as prescribed by statute. He was awarded a reasonable compensation for his services and was not paid. As a result, he sought relief in a manner provided by statute for persons in his exact position. Similarly, we conclude under the circumstances, contrary to defendants' urgings, that the plaintiff did not act adversely to notions of equity in executing against the particular property in question, despite indications that it was worth considerably more than the judgment. In the first place, it was reasonable for the plaintiff to assume that the property in question was the only suitable separate property of Josephine Hanner upon which to execute and that it was naturally preferable to execute against it as opposed to property she held in community. In the second place, defendant was nevertheless free, for a period of six months, to exercise her statutory equity of redemption as a means of preserving her interest in the property. A.R.S. §§12-1281 — 12-1289. Again, defendant neglected to use the appropriate remedy.

Judgment affirmed.

CHARLES C. BERNSTEIN, Chief Justice

CONCURRING:

ERNEST W. MCFARLAND, Vice Chief Justice

JESSE A. UDALL, Justice

SUPREME COURT, U. S.

FILED

SEP 14 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

497

JOSEPHINE HANNER,

Petitioner,

v.

CECIL DeMARCUS,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OCTOBER TERM, 1967

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IN THE

Supreme Court of the United States

JOSEPHINE HANNER, Petitioner, v. CECIL DeMARCUS, Respondent.	RESPONSE TO PETITION FOR WRIT OF CERTIORARI OCTOBER TERM, 1967

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COMES NOW your respondent, CECIL DeMARCUS, by and through his counsel undersigned, and for his response to the petition for writ of certiorari filed herein states as follows:

SUMMARY OF ARGUMENT

It is respondent's contention that only one Federal question has been raised by petitioner, that being designated as Number I of petitioner's QUESTIONS PRESENTED FOR REVIEW. Said question has been decided in favor of respondent in the case of Endicott-Johnson Corp. v. Encyclopedia Press, 266 U.S. 285 (1924). Accordingly, the instant case is not within the purview of Rule 19(a), Revised Rules of the Supreme Court of the United States, and ought not to be accorded the exercise of this Court's discretionary power of review.

ARGUMENT

Petitioner's Questions Presented Numbers II and III Do Not Raise Federal Questions Cognizable By This Honorable Court.

Implicit in petitioner's phrasing of these issues and the arguments appertaining thereto

are two notions:

First, that the fact of compliance or non-compliance with the formal requirements of the State Statute regulating executions is a matter for this Court to determine; and

Second, that the value of the property executed upon and the position of the Respondent as special master are relevant to the constitutionality of the position taken by the Supreme Court of Arizona.

It is respectfully submitted that established principles of constitutional law contravene these notions.

> "When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no Federal question, providing always that the statute as thus construed does not violate the Constitution of the United States by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive." French v. Taylor, 199 U.S. 274, 278 (1905), quoting from Leigh v. Green, 193 U.S. 79 (1904).

The opinion of the Supreme Court of the

State of Arizona in the instant case decides several issues of fact and local law which should not be reviewed by this Honorable Tribunal:

(1) Execution upon the particular property was reasonable under the circumstances, despite the alleged value thereof. (Opinion of the Supreme Court of Arizona, Petitioner's Brief p. 22)

(2) The "notice" required by Rule 53(a), Arizona Rules of Civil Procedure, 16 A.R.S., refers to a notice to the debtor of his obligation rather than of the intended execution. (Opinion of the Supreme Court of Arizona, Petitioner's Brief p. 20)

(3) Petitioner neglected to file a supersedeas bond or to exercise her statutory equity of redemption--either of which action would have appropriately remedied her present situation. (Opinion of the Supreme Court of Arizona, Petitioner's Brief, pp. 21, 22)

(4) "Execution", as used in Rule 53(a), Arizona Rules of Civil Procedure, 16 A.R.S.,

means execution upon property rather than upon the body.

Applying the principles enunciated in French v. Taylor, supra, much of petitioner's argument is bootless. Her historical excursion into contempt per Cutting v. Van Fleet, 252 Fed. 100 (9th Cir. 1900), cannot erode Arizona's province to define and interpret the word "execution" as it did. Petitioner's excoriation of respondent as a dishonorable officer of the Court ignores the fact that Mr. DeMarcus's duties as master had long since terminated when he chose to enforce his rights as a creditor. Petitioner's repeated assertion that unconstitutional inequity proceeded from a failure to comply with the provisions of the Arizona Statutes falls before the findings of the Arizona Supreme Court that said statutes were obeyed and that petitioner neglected her appropriate remedies.

The Sole Federal Question Presented by Petioner Has Been Decided in Respondent's Favor By This Court.

Otherwise phrased, petitioner's QUESTION

PRESENTED Number I asks whether the requirements of due process demand that a defendant who has been granted an opportunity to be heard and has had his day in court should, after a judgment has been rendered against him, have further notice of execution against his property. This question has been answered in the negative by Endicott-Johnson Corp. v. Encyclopedia Press, supra, and the cases cited therein.

CONCLUSION

It is respectfully submitted that the foregoing considerations exclude the instant case from the contemplation of Rule 19(a), and therefore from the proper scope of this Honorable Court's discretionary power of review. Respondent prays that the petition of Josephine Hanner be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

JOSEPHINE HANNER,
Petitioner,

v.

CECIL DEMARCUS,
Respondent.

No. 497

PETITIONER'S OPENING BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

JOSEPHINE HANNER,

Petitioner,

v.

CECIL DEMARCUS,

Respondent.

No. 497

PETITIONER'S OPENING BRIEF

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COMES NOW the petitioner herein, Josephine Hanner, by and through her counsel, Philip M. Haggerty, of the State of Arizona, and a member of the bar of this Court, and respectfully petitions the Court to reverse the decision of the Supreme Court of the State of Arizona, entitled "Betty Jo Knight, et al, Appellants, vs. Cecil DeMarcus, Appellee," Cause No. 8228, and direct entry of judgment in favor of this petitioner, and against this respondent; pursuant to the writ of certiorari issued at and under the seal of this Court on August 15, 1967.

A. *DECISION SOUGHT TO BE REVIEWED*

The decision sought to be reviewed is entitled, "Betty Jo Knight et al v. Cecil DeMarcus," No. 8228, Supreme Court of Arizona. It is reported at 102 Ariz. ....., 425 P.2d 837. The text of the opinion is reproduced in the Appendix, p. 23.

B. *GROUNDS UPON WHICH REVIEW IS SOUGHT.*

1. The opinion of the Supreme Court of Arizona was rendered on March 29, 1967. (A. p. 23)

2. Petitioner's motion for rehearing was denied on May 23, 1967. (A. p. 50)

3. The jurisdiction of this Court is founded upon Article I of Amendment XIV, Constitution of the United States, §1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without a due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Jurisdiction is also founded upon the provisions of 28 U.S.C. 1257:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: ***(3) by writ of certiorari

. . . where any title, right, privilege or immunity is specially set up under the constitution . ... of . . . the United States."

C. *CONSTITUTIONAL AND STATUTORY PROVISIONS*

Constitution of the United States

Section 1, Amendment XIV, Constitution of the United States:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

Statutes

Arizona Revised Statutes

ARS 12-1281: "Property sold subject to redemption, or any part sold separately, may be redeemed by the following persons or their successors in interest:

"1. The judgment debtor or his successor in interest in the whole or any part of the property. . . ."

ARS 12-1282: "A. The judgment debtor or his successors in interest may redeem at any time within six months after the date of sale" . . .[1]

ARS 12-1552: "A. Executions are either general or special.

"1. A general execution is one which commands the officer to whom it is addressed to make the amount of the judgment out of property of the judgment debtor without specifying the particular property.

"2. A special execution is one which commands the officer to whom it is addressed to sell certain specific property, or to deliver certain real or personal property to the party adjudged to be entitled thereto:" . . .

ARS 12-1553: "A general execution shall state the amount of the judgment and costs and the amount due thereon, and shall require the officer:

"1 If the execution is against the property of the judgment

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[1] Since amended, laws Arizona 1963, Ch. 53 §1, to provide a 30-day redemption period for abandoned and non-agricultural property.

debtor, to satisfy the judgment, with interest, out of the personal property of the debtor, and if sufficient personal property cannot be found, then out of his real property.". . .

ARS 12-1562:

"A. An officer shall execute a general execution against the property of a judgment debtor by levying on a sufficient amount of property, if there is a sufficient amount of such property, and collecting or selling the things in action and selling the other property and paying to the judgment creditor or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and costs shall be returned to the judgment debtor unless otherwise directed by an order of the court.

"B. A judgment debtor may point out to the levying officer the property he desires to be levied on, and if the officer deems it sufficient to satisfy the execution, he shall make levy on no other property." . . .

ARS 12-1559: "The officer to whom the writ is directed shall make the levy as follows:

1. To levy on real estate it is sufficient that the officer endorse the levy on the writ of execution and file with the county recorder of the county where the real property is situated a copy of the writ with the endorsement of levy thereon.

2. To levy on personal property the officer shall take possession when the defendant in execution is entitled to the possession. ***"

ARS 12-1621: "A. Notice of sale under execution shall be made as follows: . . .

3. For the sale of real property, notice shall be given by posting notices for not less than fifteen days successively before the day of sale in three public places in the county, one of which shall be at or near the court house door, and publishing a copy thereof in a newspaper for three weeks before the day of sale."

Rules of Procedure

Rule 53, Arizona Rules of Civil Procedure

Federal Rules of Civil Procedure:

"53(a) Appointment and compensation . . . . As used in these Rules, the word 'master' includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such other parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation, but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

D. *QUESTIONS PRESENTED FOR REVIEW*

I

Is it a violation of the provisions of Section 1, Amendment XIV to the Constitution of the United States for a state court to approve and enforce a procedure by which an officer of the court, to-wit, a special master appointed by the court, may execute upon the property of a party appearing before him and purchase said property at execution sale without actual notice to the party-property owner of either intention to execute, execution, or sale?

II

Is it a violation of the provisions of Section 1, Amendment XIV to the Constitution of the United States to approve and enforce a law by which such an officer of the court and special master may retain the benefit of ownership of such property by an execution sale, where the evidence of the real value of that property, which evidence was obtained by said special master in the performance of his official duties, shows the property to be worth between four and eight times the amount awarded said special master as his compensation?

III

Where a judgment creditor who is an officer of the court is aware of personal property sufficient in value to satisfy his judgment against a party, and he fails to inform the levying officer of such property and directs specific execution against a certain piece of real property; and the levying officer makes no attempt to locate personal property or to inquire of the debtor which real property should be levied on, all in violation of the clear terms of the statutes relating to executions, is not such a violation of the statutes by two officers of the court, without notice to the debtor, a

violation of the traditional notions of due process and fair play, in contravention of Article 1 of Amendment XIV, Constitution of the United States?

E. *STATEMENT OF THE FACTS*

This case originated as a quiet title action involving certain land located in Maricopa County, Arizona. The land had been owned by petitioner Josephine Hanner, and the action was brought against her by Cecil DeMarcus, respondent herein, against her, her daughter, Betty Jo Knight, and two other persons apparently claiming lien interests in the land. (A. p. 5) Although the complaint does not so state, subsequent pleadings disclosed the basis for Mr. DeMarcus' claim of title.

Cecil DeMarcus is and was a certified public accountant who had been appointed by the Superior Court of Maricopa County, Arizona, as a special master in Cause No. 49044, entitled, "Arthur E. Hanner v. Josephine Hanner". (R. of Master, Exh. A)

This cause was a divorce proceeding, and DeMarcus was appointed pursuant to Rule 53, Arizona Rules of Civil Procedure, to assist in the untangling of the complicated property situation of the Hanners. As special master, he was awarded the sum of $5,572.10, which sum was ordered to be paid by Josephine Hanner as part of the judgment and decree of divorce entered June 21, 1959. (A. p. 2)

This decision was taken by appeal to the Supreme Court of Arizona and was decided by that court on January 15, 1964. *Hanner v. Hanner,* 95 Ariz. 191, 388 P.2d 239.

The amount of the fee was not disputed, solely its apportionment entirely to Mrs. Hanner. (See dissenting opinion, Jennings, J.)

As we noted in our petition for certiorari, we took no issue with this decision, but note it merely to point out that all of the acts of DeMarcus relative to the property took place while this appeal was pending.

After the entry of judgment and on September 18, 1959, a writ of general execution was issued out and under the seal of the

Superior Court of Maricopa County in Cause No. 49044, directed to the sheriff of Maricopa County and commanding him to execute in statutory language upon the personal property of Josephine Hanner, or if none could be found, upon her real property, in sufficient amount to pay the judgment amount of $5,703.10 to DeMarcus.[2]

Pursuant to this writ, the property in question was sold at execution sale and a sheriff's deed issued to "Harold" DeMarcus: (A. p. 2)[3]

The sale took place on October 29, 1959, and the deed issued on March 27, 1962. (A. p. 9) Apparently, the provisions of ARS 12-1621, pertaining to the posting of notice and the advertisement by publication, were followed.

Josephine Hanner took the position and stated from the beginning of the quiet title action that no notice of this execution or sale was given to her. See her verified answer (A. p. 7) The answer also prayed the execution be set aside as void. (A. p. 9) Following the answer, DeMarcus moved for summary judgment, alleging compliance with the notice statutes. (A. p. 11)

Mrs. Hanner replied again under oath by affidavit attached to her response to motion for summary judgment, stating she was never aware of any proceeding against the property, either by information provided by DeMarcus or the sheriff, and also alleging payment of taxes on the property during the time at which it was alleged that an execution had been run. (A. p. 17)

The motion also stated that her then attorney, John Levy, was in constant contact with DeMarcus, practicing on the same floor of the same small office building, and that at no time during their

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[2] The parties herein have not been able to locate a copy of this writ for inclusion in the Appendix; the sole copy extant being the original filed as part of the record herein. The execution apparently includes additional costs.

[3] This is apparently a typographical error, as all of the actions brought herein related to Cecil DeMarcus.

many conversations was the subject of a possible execution mentioned.

Summary judgment was, however, entered against the petitioner herein in November of 1963. (A. p. 19)

A motion for new trial was filed thereafter by the petitioner herein, again raising the question of notice and due process. (A. p. 20)

Appeal to the Supreme Court of the State of Arizona followed, in which the same argument was among those alleged, but was not accepted by the court in its opinion. (A. p. 23)

Following the opinion of the Supreme Court of Arizona, an extensive motion for rehearing was filed in that court, in which verified statements again were presented to the court to the effect that Josephine Hanner had no notice of any execution or sale, that she had personal property in excess of the judgment against her, that no attempt was made to levy upon this property, and that the fact that she had such personal property was known to Cecil DeMarcus. (A. pp. 44, 45)

The frequent meetings between her counsel and Cecil DeMarcus were again pointed out and statements of DeMarcus taken on deposition introduced, in which he stated that he deliberately avoided mentioning to her attorney the fact that he was seeking execution to collect his fee. The motion for rehearing also pointed out that she had been paying the taxes on the property during the interim, and that therefore she was the record owner of the property with her address known and available during the entire period. It was also pointed out that she has been living at the same address in Phoenix for a considerable period of time, and was readily available by either telephone or mail contact. (A. pp. 33, 44, 45) The motion for rehearing was denied.

The value of the property seized under execution sale was set and determined by DeMarcus as part of the divorce proceedings to be of the value of approximately $20,000. (R. master's report, Exh. A, p. A3) Mrs. Hanner herself set the value of the property at approximately $40,000. (A. p. 45)

F. *SUMMARY OF ARGUMENT*

The petitioner urges that it is error and a violation of due process to permit an execution and sale of real property where the laws of execution state that personal property must first be seized, and no effort was made to seize or levy on such property despite actual knowledge by the judgment creditor that personal property was available for seizure.

It is also urged that, where a statute allows a judgment debtor to point out real property to the sheriff to be levied upon, a denial of this opportunity to the judgment debtor is a denial of notice required by the statute, and a denial of due process.

The petitioner urges that, where the statutes taken together require an actual contact between the levying officer and the debtor to fulfill all legal requirements or to afford an opportunity for the exercise of all rights granted by law to the debtor, and where such statutes are not strictly followed, the notice required by law has therefore not been given, and process has not been followed. Since failure to follow process of law in a substantial area such as notice has resulted in substantial loss; the property of the petitioner herein has, in fact, been taken without due process in violation of our constitutional provisions.

The petitioner further urges that, even if this court does not hold that actual notice is a requirement in all cases of execution sale, in this instance the respondent, as special master and officer of the court, may not use his special knowledge of the property of parties to the hearing before him to make a substantial personal profit far beyond his awarded fee. The actual proceedings herein whereby the respondent did precisely that are an affront to traditional notions of fair play and substantial justice.

The petitioner also urges that the remedies of a special master to not allow him to seize the property of a party appearing before him, without notice, allow him only to cite that party for contempt, such citation necessarily requiring actual notice. This notice was not here provided, and the failure to so provide it again violates our traditional notions of due process.

G. *ARGUMENT*

A Party With Actual Knowledge of Personal Property Subject To Execution Must Execute On This Property First.

As the statutes of Arizona provide, ARS 12-1553 (p. 3, *supra*), a general execution must be satisfied first out of the personal property of the debtor. Herein the record is clear that the judgment creditor, Cecil DeMarcus, as special master and by virtue of that position, had actual knowledge of the existence of personal property belonging to the judgment debtor, petitioner herein, of a value in excess of that of the judgment. (R. Report of Master, Exh. A; p. A. 3)

The list of personal property available is quite extensive. In addition, in her affidavit, Mrs. Hanner stated that she had owned an automobile. (A. p. 47) Ownership of an automobile is a matter of record in Arizona, as in most states, and can be easily obtained. Perhaps in general circumstances, one might not say that the sheriff is bound to look high and low across the breadth of his county for personal property, but we believe that an equity master may not retain and conceal from the sheriff actual knowledge of personal property available to satisfy his judgment, in order to levy on a specific piece of real property.

By this we do not mean to necessarily imply that the sheriff is without duty in the premises. Since a simple inquiry of the judgment debtor herself could have revealed the information to the sheriff, we believe it is not asking too much to state that this is a requirement. In fact, this duty of the sheriff was specifically enjoined by him by an earlier and, we believe, wiser Arizona Supreme Court in *Blasingame v. Wallace,* 32 Ariz. 582, 61 Pac. 42, where it held as follows:

> "But when there is no one concerned other than the parties to the judgment, the execution, and the sale, and the motion to vacate is made within a reasonable time, the sale may be set aside where it is shown that the judgment debtor had sufficient personal property which could have been applied on the judgment, and that the officer knew it, or by the exercise of reasonable diligence could have discovered it, and failed to levy upon it, but

instead levied upon and sold for the amount of the judgment real property worth many times said sum." Blasingame v. Wallace, 32, Ariz. 582, 61 Pac. 42 (1927) at 32 Ariz. 586.

The essential point remains, however, that an officer of the court, with actual knowledge of personal property, did not attempt to execute on it when he knew it was readily available.

The Failure To Provide The Opportunity To Point Out Real Property Cut Off Substantial Rights Of The Petitioner.

This Court in *Griffin v. Griffin,* 327 U.S. 220, had the following to say:

> "It is plain in any case that a judgment in personam by directing execution to issue against petitioner, and thus purporting to cut off all available defenses, could not be rendered on any theory of the state's power over him, without some form of notice by personal or substituted service. [citations omitted] Such notice cannot be dispensed with, even in the case of judgments in rem with respect to property within the jurisdiction of the court rendering the judgment." 327 U.S. at 228.

In the specific case decided by the court, the petitioner had been involved in a divorce proceedings. Supplemental proceedings were held in New York, resulting in a judgment against him, for past due alimony in 1935. He had notice of these proceedings. His wife ex parte in 1938 obtained an addition to this amount for arrearages accruing between 1936 and 1938. These proceedings were without notice to the husband. Thereafter, execution was sought for the whole amount. We recognize, of course, that the petitioner herein had notice of the original judgment against her, and that there was no question of subsequent proceedings resulting in a higher amount, as in the *Griffin* case, but we believe the case does stand for the principal that subsequent proceedings without notice which result in the cutting off of defenses can result in a holding that the proceedings have violated due process. While here Mrs. Hanner had no subsequent "defenses" cut off, she did have certain rights cut off by the failure of notice. Specifically, she had the right to point out to the sheriff other property which she might have desired be levied upon, (A.R.S. 12-1562) or even in the instant case individual lots, rather than the four which were

seized by the sheriff. Even if she had no other property or did not wish her property to be seized, she might readily have argued to the sheriff that the seizure of one of the four lots involved would be of sufficient value to satisfy the judgment. In fact, however, under the procedure used herein and through a neglect of the sheriff to follow the applicable statute, DeMarcus could have levied and executed upon real property owned by the petitioner in 20 to 100 times the amount of his judgment, had she owned that much property.

The provisions of the statute on execution allowing a debtor to point out his property, combined with the statute providing that personal property must be seized first, prior to any levy on real property, are a substantial protection to the judgment debtor required by the laws of the State of Arizona and supported in *Blasingame v. Wallace, supra.* They are not only substantial but, in fact, the sole protection to the judgment debtors in the area of notice, and a failure to follow them is a denial of notice required by the statutes and a violation of due process.

The Total Statutory Scheme in Arizona of Levy, Execution and Sale Requires Actual Notice Not Provided Herein.

Obviously, states may provide various methods of plans by which property is levied upon, executed and sold to satisfy judgments. It is also conceivably possible that a statutory scheme could be worked out whereby no further notice to a judgment debtor were ever required, and due process not violated. However, we are not concerned with that possibility herein, because we believe that the statutory scheme of Arizona requires actual notice and that, therefore, the failure to follow it is a failure to afford her the process provided by the laws of the state and upon which all of its citizens have a right to rely. Such a failure where substantial damage is done is a violation of due process.

A levy or writ of execution upon real property is accomplished simply by endorsing the levy or writ and filing it with the county recorder of the local county. ARS 12-1559 (*supra,* p. 4). Obviously, this requires no notice to the party, contrasted with the next

paragraph which requires actual reduction to possession of personal property levied upon. Further, the provisions relating to sale require posting in three places, one of them at or near the courthouse, and advertisement in a newspaper. ARS 12-1621 (*supra*, p. 4).

This Court has often re-enunciated the principle first clearly set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, to the effect that "notice must be such as is reasonably calculated to reach interested parties." The concept that notice is achieved by posting or by publication was chipped away at in this case and in *Walker v. City of Hutchinson*, 352 U.S. 112, and finally, properly laid to eternal rest in *Schroeder v. City of New York*, 371 U.S. 208.

Where then does the requirement of notice arise? We believe it arises from the statutory requirement that a debtor be allowed to point out to the sheriff the property he desires to be levied upon. We can think of no statutory language which would more clearly indicate the fact that the sheriff and the judgment debtor have to come face to face to discuss the execution which the sheriff holds in his hand. We can well imagine how a legislature, after enacting such a statute, would go home well satisfied in the belief that no real property could be seized by a sheriff without the judgment debtor's being aware of the levy and execution.

The importance of notice as being a substantial matter for the judgment debtor specifically goes to the matter of redemption. As pointed out by our redemption law, ARS 12-1281-82, (*supra*, p. 3), a judgment debtor in the position of Mrs. Hanner in 1962 could have redeemed the property within six months from the date of the sale. The sale, as noted herein, took place on October 29, 1959 (A. p. 3).

The Supreme Court of Arizona pointed out this redemption provision, but failed to answer the question which first occurs: if you don't know the property has been sold, what would inspire you to redeem it?

This is particularly true in view of the fact that Mrs. Hanner was

still receiving tax bills after the property had been sold (A. pp. 18, 45), and would receive such bills in the normal course of events until the sheriff's deed was recorded in 1962.

The treatment rendered this by the Supreme Court of Arizona was as "cursory" as its admitted treatment of the subject of notice. In support of its position that "notice of the intended execution is immaterial and does not stand in the way of a summary judgment" (A. p. 26), the Supreme Court of Arizona cited *Maloy v. Taylor*, 86 Ariz. 356, 346 P.2d 1086. This case deals with the dismissal of a personal injury action turning upon certain phases of the New Mexico "guest statute", and contains as matter applicable to the instant case only the holding that, where there are no material issues of fact as a result of depositions or affidavits, a summary judgment may be granted. There is absolutely no mention in the case whatsoever of notice of execution or even the word "execution". There could not be, since no judgment was ever rendered in the court below or treated in the Supreme Court.

The Use of Specialized Knowledge By the Master to Effectuate Gross Personal Profit Is a Violation of Due Process.

A master at equity occupies a traditional position of long standing in courts of equity. The federal court system, as well as many states systems, has continued the use of masters in many proceedings. While a special master may not be said to sit upon a woolsack, he certainly acts under the aegis of the chancellor. As this Court has previously held:

> "He occupies a position of honor, responsibility and trust; the court looks to him to execute its decrees thoroughly, accurately, impartially, and in full response to the confidence extended; . . . The rights of those who ultimately pay must be carefully protected." *Newton* v. *Consolidated Gas Company of New York*, 259 U.S. 101.

Sell also *In re Gilbert*, 276, U.S. 6, to the effect that he has "the duties and obligations of a judicial officer".

And in the lower federal courts, we find that "he should be a person fit to perform the duties incumbent upon one sitting in

place of the court". *Finance Committee v. Warren,* 82 Fed. 525 (7th Cir. 1897).

See also *Universal Oil Products v. Hall,* 76 F.2d 258 (8th Cir. 1935), cert. denied 296 U.S. 621, to the effect that

> "A Master is a public servant engaged in a public function. He is an aide to the court of his appointment. He is not a servant of the litigants or a servant of their attorneys."

We find these dictates a little difficult to coincide with the activities of DeMarcus in this particular matter. His own report filed in the divorce action is, as we pointed out, a detailed analysis of the property owned by Mrs. Hanner primarily, and by her husband. The deposition of DeMarcus taken in the quiet title action and quoted in part in the motion for rehearing (A. p. 33) shows he communicated with Mrs. Hanner and her attorney both before and after the judgment, and that he did not mention the execution because, "Oh, I don't want to get into any arguments over anything as to whether I should or should not do it".

His own report (R. Report of Special Master, Exh. A) sets the value of the property in question at $20,000. There can be no doubt of the fact that DeMarcus could have easily informed Mrs. Hanner of the steps he was taking. He knew her attorney, her address, all the property she owned, in fact, far more than would be normal for an ordinary judgment creditor.

All of this information was obtained by him in the course of his official duties as a special master. These duties involved a detailed analysis of all the books and records kept by Mrs. Hanner concerning interest in a number of pieces of property with a further analysis of the encumbrances which might be on each of them. While we do not doubt the fairness of his fee in the amount of $5,000, our conscience is shocked by the fact that he turned this $5,000 judgment into a piece of property worth at least $20,000.[4]

This court in *Newton v. Consolidated Gas Co. of NY, supra,* not only held that "the rights of those who ultimately pay must be

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[4] The testimony of Mrs. Hanner to the effect that the property is worth $40,000 has, in fact, never been rebutted or denied.

carefully protected", but also that "his compensation should be liberal, but not exorbitant."

We fail to understand how the Supreme Court of Arizona can hold that $15,000 over and above the award of the court constitutes careful protection of the rights of the parties appearing before this special master. It is so gross as to shock the conscience of any court.

Such an underhanded use of his official knowledge and position by a special master is, fortunately, not common, as we have few cases on the subject. In *Universal Oil Products Co. v. Hall,* 76 F.2d 258 (8th Cir. 1935), cert. denied 296 U.S. 621, we do have a case in which one of the acts of the special master properly condemned was the fact that this master, in a patent proceedings of a complicated nature involving oil cracking, filed in his own name an application for a patent in the same field, obviously using the information learned by him in the course of the litigation. We have much the same parallel here.

DeMarcus used his information of the value of the property and directed the sheriff to seize four lots which he knew were of the minimum value of $20,000. Since his fee was slightly in excess of $5,000, one or perhaps at the most two of these lots would have satisfied the judgment.

He ignored the existence of personal property in an amount which would also have satisfied the judgment. He used his knowledge, authority and position to effectuate a substantial personal gain for himself. Such activity on the part of an officer of the court damages the entire judicial system and destroys the respect and trust of litigants and their reliance that disputes will be fairly heard and judged. This reliance, trust and belief so well earned by so many courts is the true authority of all courts, and damage inflicted to one injures all.

An Equity Master May Not Execute on the Property of Persons Appearing Before Him Without Notice.

Petitioner also urges herein that the remedy of execution by a special master on property of a party appearing before him is not,

in fact, authorized by statute, case law, or traditional equitable principles, and therefore the allowance of such an execution in this case is without due process of law where no notice has been provided.

The law in Arizona relating to the right of a special master to collect a fee awarded him is set forth in Rule 53(a), Arizona Rules of Civil Procedure, (*supra*, p. 5) which is, in effect, the same as Rule 53(a) of the Federal Rules of Civil Procedure. The rule specifically states that a special master may have "execution against the delinquent *party*". (emphasis added) Nothing is mentioned about an execution against the *property* of a party. The use of the word "party" would imply notice to the person, as one may not execute against a person without having him actually brought before the court.

The present Rule 53 is an adoption in part from Equity Rule 68. That rule read, insofar as is pertinent, to the effect that a special master may have "attachment for the amount against the party". It has been held that

> "It seemed best to the committee to make no startling changes in the existing practice, (as to reference) so the subject is covered by a single rule which merely attempts to clear up some of the most important obscurities that now exist." 28 Va. L.Rev. 261.

The one explanation of this rule which is found in our body of federal jurisprudence appears to be *Cutting v. Van Fleet*, 252 Fed. 100 (9th Cir. 1900). There the court held that the remedy was by contempt proceedings and that an order to show cause need not be issued before the party be found in contempt. In explaining the nature of the rule, the court held as follows:

> "The answer to the appellant's contention is that the order here made is not for the benefit of a party to the suit, and is not of the character of a judgment or decree for the payment of money, or a debt found due to the master. The proceeding is in contempt for refusal to obey an order of the court. The obligation to pay does not arise out of contract. It rests solely upon the order of the court. It operates upon the appellant in personam. Samel v. Dodd, 142 Fed. 68, 73 C.C.A. 254; Meeks v.

State, 80 Ark. 579, 98 S.W. 378; Wightman v. Wightman, 45 Ill. 167; Carlton v. Carlton, 44 Ga. 215. Rule 68 has taken away the rights of the master to hold his report until payment of his compensation and has given him in lieu thereof the right to the remedy of attachment."

The court then went on to hold that this did not constitute imprisonment for debt, as contempt of court was never held to be deprivation of this constitutional protection.

Thus, the only change we have in the old equity rules and the present rule is a substitution of the word "execution" for "attachment". The effect of the phrase is still that either remedy is directed against the "party", not against any property of the party involved.

Proceedings in contempt, like all equity proceedings, are in personam, and may not be enforced without actually bringing the delinquent party before the court inorder to impose punishment for contempt. *Holt v. Virginia,* 381 U.S. 131; *In re Oliver,* 333 U.S. 257.

Since the advisory committee apparently intended no drastic changes or substantial alterations of the old equity rules, but merely to correlate them into a better legislative pattern, we believe we can assume that the present rule is merely an extension of the old equity rule and that the remedy of a master who was not paid is to cite the party for contempt of court and execute upon his person.

If the promulgators of the federal rules wished to imply that the remedy was to be taken against the property of the debtor, it would have been a matter of the greatest simplicity to place the word "property" in the statute. But they permitted the phrase to remain "against the delinquent party".

The only conclusion which can be reasonably drawn is that those who recommended the rules and those who adopted them wished to continue the remedy to be a personal remedy against the delinquent party individually. Equity has always traditionally acted in personam, and this would be totally in accord with normal equitable practice.

The importance of this distinction herein lies in the fact that an action directed against a party for contempt would provide him with actual notice of the proceedings against him. Here there was no such actual notice, as we have pointed out, only the posting of notices or legal advertisement does not constitute any actual notice. Here we have an obligation of the special master, which obligation "the mailing of a single letter would have discharged", *Schroeder v. City of New York*, 9 L.Ed.2d 255.

The special master herein deliberately avoided the discharging of this obligation by even the mailing of a simple letter to Mrs. Hanner. He ignored the holding of the only federal court to consider the matter, *Cutting v. Van Fleet, supra*, and completely flouted the requirements of his position of "honor, responsibility and trust".

CONCLUSION

It is respectfully submitted that the proceedings herein conducted by respondent DeMarcus show that rules of procedure were ignored, statute was ignored, and that he used his special knowledge obtained by him acting as an arm of the court to acquire valuable property far in excess of his awarded fees. His conduct shows not only an absence of equity, but a deliberate, calculated, and awesomely successful effort to deprive the petitioner of her rights and her property and is an affront to the traditional notions of due process and substantial fair play heretofore so admirably protected by this Court.

Your petitioner prays that this Court reverse the decision of the Supreme Court of the State of Arizona and directs that it issue its mandate to the Superior Court of the State of Arizona in and for the County of Maricopa directing said court to set aside the levy, execution and sale of the real property involved in Cause No. 49004, as prayed for by the answer of the defendant, Josephine Hanner, therein.

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SUPREME COURT, U. S.

JAN 16 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

JOSEPHINE HANNER,
Petitioner,

v.

CECIL DEMARCUS,
Respondent.

No. 497
RESPONDENT'S
ANSWERING
BRIEF

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SUMMARY OF ARGUMENT

The principal contentions of petitioner herein were neither timely raised nor passed upon by the Supreme Court of Arizona, and accordingly are not properly before this Honorable Court. These include (1) the alleged lack of compliance with the Arizona Statutes relative to execution, and (2) the argument that the only constitutionally permissible construction of Rule 53(a), Rules of Civil Procedure, A.R.S. 16, is that the remedy therein provided to the master is execution upon the person rather than upon his property.

Granting petitioner's assertion that actual notice of post-judgment execution upon property is required in Arizona per confrontation by the sheriff pursuant to A.R.S. 12-1562, there can be no constitutional requirement that prior notice be afforded by the provisions of Rule 53(a).

ARGUMENT

Petitioner's assertion that failure to comply with the Arizona law resulted in a deprivation of property without due process was neither timely raised nor passed upon in the Supreme Court of Arizona, and thus is not properly before this Honorable Court.

Petitioner contends, and respondent wholeheartedly agrees, that the execution statutes of the State of Arizona require actual notice to the judgment debtor of execution upon his property, and that such notice is embodied in confrontation with the sheriff and in the opportunity to designate the property to be executed upon. *Blasingame v. Wallace*, 32 Ariz. 582, 61 Pac. 42 (1927).

Petitioner argues that the decision of the Arizona Supreme Court herein is contrary to the "earlier and, we believe, wiser" case above cited. It is not. Perusal of the record reveals that the issue of noncompliance with the rule enunciated in *Blasingame, supra,* was not presented to the Supreme Court of Arizona until Petitioner's MOTION FOR REHEARING. (Compare APPELLANT'S OPENING BRIEF and APPELLANT'S REPLY

BRIEF filed herein with A. p. 34-37). Said motion was summarily denied by the Arizona Supreme Court. (A. p. 50).

It has been the unswerving policy of this Honorable Court not to accord review to questions initially raised upon motion for rehearing, unless the State Court entertains and passes upon the issues so presented; the motion for rehearing is no part of the record upon which the judgment is based. *Radio Station WOW v. Johnson,* 326 U.S. 120 (1944); *Godchaux Co. v. Estopinal,* 251 U.S. 179 (1919); *Simmerman v. Nebraska,* 116 U.S. 54 (1855).

The sole federal question passed upon by the Supreme Court of Arizona concerned the interpretation and constitutionality of Rule 53(a), Rules of Civil Procedure, A.R.S. 16, and the position of the Court relative to said statute is in every particular in accord with the demands of due process.

It was petitioner's contention as appellant before the Supreme Court of Arizona that Rule 53(a) was not "self-executing", i.e., that some further notice other than that of the judgment awarding master's fees was demanded by the statute before execution could occur. Petitioner urged that a contrary construction would result in a deprivation of property without due process. (APPELLANT'S OPENING BRIEF, issue No. 4, p. 14, issue No. 6, p. 15, Assignment of Error, No. VI, p. 21, Assignment of Error No. VII, p. 22, Assignment of Error, No. VIII, p. 22, Propositions of law No. IV, V and VI, pp. 27, 28). All other matters of constitutional import were either (a) raised for the first time on motion for rehearing (e.g., the argument per *Cutting v. Van Fleet,* 252 Fed. 100 (9th Cir. 1900) relative to execution upon the person, as well as the issue of noncompliance with the execution statutes previously discussed), or (b) have been abandoned by petitioner herein (e.g., the argument that Rule 53(a) is unconstitutionally vague).

The Supreme Court of Arizona ruled that no notice of intent to execute was required after proper notification of the judgment, and that Rule 53(a) was not lacking in the protections guaranteed by the requirements of due process (A. pp. 25, 26).

These rulings were made entirely within the context of Rule 53(a), and of course did not involve the construction or application of the execution statutes, since appellant had made no argument relative thereto nor even cited said statutes at that time.

The clear intent and result of Rule 53(a) is to place respondent in precisely the same position as any judgment creditor with the right to execute upon property. Petitioner concedes the constitutionality of the execution provisions re notice. Is it not fundamentally illogical to urge that notions of fair play require *prior additional* notice of intention to execute? Will this Honorable Court decide that *two* forms of actual notice be demanded hereafter, when none is now required? The inequities which are admittedly possible under the rationale of *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285 (1924), are not possible under the laws of Arizona *provided those laws are obeyed.* Whether there was fair compliance with the law in this case, and whether the Supreme Court of Arizona would have decided differently had the applicability of *Blasingame v. Wallace, supra*, been argued before it, are matters not properly at issue in this Honorable Court.

The meaning of the word "execution" as contained in Rule 53(a) is not properly reviewable herein.

As parenthetically noted heretofore, the Supreme Court of Arizona was never asked to consider the meaning of the word "execution" until the filing of petitioner's notice of rehearing. The matter was not considered at that time and cannot be entertained at this time. *Radio Station WOW v. Johnson, supra; Godchaux Co. v. Estopinal, supra; Simmerman v. Nebraska, supra.* Further, it seems self-evident that execution upon property is as constitutional as execution upon the person, provided that the demands of fair play are not lacking in either remedy.

Equitable considerations require affirmance of this case.

Counsel feels that the foregoing arguments are dispositive of the case at bar. Respondent shares petitioner's concern for fair-

ness, however, and urges strongly that his conduct in this matter was equitable in every regard.

Respondent earned a fair fee for a job well done. This is not disputed by petitioner. The record is utterly devoid of any tender whatever of this fee by petitioner, which tender is a condition precedent to demand for the equitable relief here sought. *Young Mines Co. v. Sevringhaus,* 38 Ariz. 160, 298 Pac. 628 (1931); *33 C.J.S. Executions,* §239 b., p. 500.

Petitioner was notified of the possibility of execution in the clearest possible language by the judgment and decree of divorce dated June 21, 1959 (A. p. 2). Yet, she failed to use the personal property allegedly available to file a supersedeas bond (A. p. 27).

Noting, once again that the Supreme Court of Arizona was not confronted with a single argument relative to the availability of personal property until motion for rehearing, its conclusion as to the reasonableness of execution upon the subject parcel is adequately reasoned and well within the bounds of its discretion (A. p. 27). Moreover, respondent is unable to agree that his report reveals personal property upon which execution might practicably have been obtained. The real estate contracts with a balance due of $12,693.24 (R. Report of Master, Schedule A-2), the furniture and fixtures worth $3,153.07 (R. Report of Master, Schedule A-3), and the automobiles worth $710.10 (R. Report of Master, Ex. A), are the only items mentioned, and surely offer little security for a fee in excess of $5,000.00. Neither can it be said that the price paid for the land was inadequate; the language of *Fox v. Jackson,* 116 Ind. App. 390, 64 N.E. 2d 799 (1946) seems appropriate:

> " . . . the test of adequacy of price is not what the property is worth, but what it will bring at a fair sheriff's sale, which is, of course, a forced sale. 33 C.J.S., Executions, §233, p. 493. No witness expressed an opinion as to what price the property would bring at a forced sale, but the court was entitled to believe that such a price might be substantially less than the fair market value."

Mr. DeMarcus was not acting as an officer of the court when he executed upon petitioner's land. He was enforcing his rights as a creditor. His report was a matter of public record. In the language of the Arizona Supreme Court, he executed upon property which he could reasonably assume to be "the only suitable separate property of Josephine Hanner upon which to execute." (A. p. 27).

CONCLUSION

The statutes of Arizona provided to petitioner every protection required by the Constitution of the United States. If the payment of her just debt did not exactly correspond to the amount owed, the explanation lies in her neglect to avail herself of the proper remedies, or from the failure of the sheriff to comply with the statutory requirement of actual notice. Of the first cause, she cannot complain. Of the second, she did not. Respondent prays that this Court not strike down the decision of the Arizona Supreme Court upon grounds neither presented to nor considered by that Tribunal, and respectfully asks that its judgment be affirmed.

Respectfully submitted,

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No. 497

PETITIONER'S REPLY BRIEF

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SUMMARY OF RESPONSE

The respondent herein would appear to agree with the principal contentions of the petitioner to the effect that the notice provided the petitioner, relative to the sale of her real property, was insufficient as a matter of fact and law to constitute due process, and that, therefore, there was an abuse of due process in violation of Amendment XIV, Constitution of the United States. The main, if not the sole, serious attack of the respondent is purely on the ground that the Federal question was not properly preserved in the Courts of Arizona. We believe that both this and the other arguments of respondent are in error.

ARGUMENT

The Federal Question Was Properly Before the Arizona Courts and Before This Court.

Respondent argues that the question of notice was not presented to the Supreme Court of Arizona until the petition for rehearing, and that, therefore, this Court may not entertain such an argument. We disagree.

We are initially faced with the somewhat embarrassing fact that the briefs filed in the Supreme Court of Arizona have not been printed in the Appendix of Record herein. We can only state that since the argument of respondent that there was a failure to preseve the Federal question was not raised in response to the Petition of Certiorari herein, it was not thought necessary to reprint the briefs, a lengthy and expensive process. We assume, however, that the provisions of Rule 36(2), especially the last sentence thereof, will apply. The basic attack of the petitioner herein on the decision of the Supreme Court of the State of Arizona is set forth in the Questions Presented For Review set forth on pages 5 and 6 of the Petitioner's Opening Brief, and also set forth in the Petition for Certiorari. What we are attacking here is a procedure, not a statute. We believe it is quite evident from the brief of the petitioner filed in the Supreme Court of the State of Arizona, that the entire procedure of execution, levy and sale

without notice was one of the basic complaints of Mrs. Hanner. (Appellant's Opening Brief, Supreme Court of Arizona, page 4, page 8, 7) These pages are cited in addition to the matters noted by the respondent. Also see Appellant's Opening Brief, Supreme Court of Arizona, Issues, pages 15, 16.

The opinion of the Supreme Court of Arizona (A. 23-27) clearly indicates that lack of notice of the execution proceedings was one of the claims of Mrs. Hanner which was denied by the Court. It also noted that this claim included a prayer that due process had been denied her. The only "method" before the Supreme Court, which method it held to be proper and neither "vague or lacking in the protections guaranteed by the Due Process clauses of either the Arizona or Federal Constitutions" was the method used, execution upon the real property of JOSEPHINE HANNER, levy and sale.

Nor can we admit that a Motion for Rehearing is meaningless. Its denial is essential to the invocation of the jurisdiction of this Court in cases arising in a forum providing such a method of additional review. Under Arizona law the mandate of the Supreme Court to the lower Court containing the terms of affirmance, reversal or modification cannot issue until the motion has been considered and a ruling made, *Rule 14(a), Rules of the Supreme Court Arizona.*

We do not believe that the cases cited by the respondent support the conclusion which he seeks to urge upon this Court now. In *Radio Station WOW, Inc. vs. Johnson,* 326 U.S. 120, an argument was made that the Federal Communications Act had entirely withdrawn from the State Court there involved jurisdiction over the properties of the radio station. This Court noted in its decision that it was "only after the Nebraska Supreme Court's original opinion did petitioners, by motions to dismiss the suit and for rehearing, claim that the Nebraska Courts were wholly without jurisdiction over the controversy." Clearly, this preemption argument was never raised until the conclusion of the state proceedings. This is simply not true herein. In the second case cited, *Godchaux Co. vs. Estopinal,* 251 U.S. 179, the argument

that a state constitutional provision was invalid "because of conflict with the Federal Constitution" was not urged in any way "until it applied for a rehearing in the Supreme Court". As this Court noted, the appeal to the Supreme Court of Louisiana was based only upon the argument that an amendment to the Louisiana Constitution deprived the trial Court (or the state Courts in general) of jurisdiction over the subject matter. Again, there is no parallel with our present case. Mrs. Hanner argued consistently that the taking of property without notice was a violation of her Federal Constitutional rights. In the Louisiana case, the question of conflict with Federal Constitutional provisions was not made until the close of the proceedings, and in the radio station case the argument of preemption was not made until the close of the state Court proceedings.

The third case cited by the respondent, *Simmerman vs. State of Nebraska,* 116 U.S. 54, is somewhat more barren as to the record, but it is clear that the Court held that there was a failure to raise Federal objection throughout the proceedings. The Court held that: "It nowhere appears from this record (citing virtually every trial and appellate proceeding) that any Federal question was actually presented for consideration. . . ."

We assume from the fact that no mention is made of the trial Court proceedings, that respondent agrees that this question was preserved beyond all doubt at the trial stages. See paragraph III of the Affirmative Defenses in the original answer of JOSEPHINE HANNER (A. pages 9-10) the affidavit submitted for the purposes of opposing summary judgment (A. 17-18); the Motion for New Trial (A. 21), all of which allege lack of notice and its consequent violation of the Federal Constitution.

The essential fact remains that petitioner herein steadfastly and continuously complained that lack of notice of the execution upon her real property deprived her of that property in violation of the Constitution of the United States. While the emphasis of the argument may have varied, the issue was always present and before all Courts which considered the question. The petitioner may have emphasized a particular right to notice under Rule 53

in her Opening Brief before the Arizona Supreme Court, rather than the general right to notice under execution sales statutes, but both arguments were made at all state levels. Her injury, the loss of her property, was alleged; the cause, no notice of execution proceedings, was alleged; the Constitutional deprivation was alleged. The Supreme Court of Arizona in its decision noted the constitutional claim and denied it. The fact that their denial was summary does not make it any less a denial.

There is No Question of Tender Before the Court

Respondent attempts to make an issue of failure of equity on the part of the petitioner by alleging that she should have tendered the amount of the judgment. In the Courts of Arizona, the petitioner consistently urged the reasonable argument that a Master's fee was in the nature of costs and would abide the outcome of the appeal. We are not concerned with the merits or demerits of this legal position; suffice to say that this argument has some legal support, and it was upon this that petitioner relied. (Opening Brief of Appellant, Arizona Supreme Court, pages 35-37) We believe that tender, as a basis for equitable redress, is only required where a party admits an obligation or part of any obligation. Where the refusal to pay is based on a reasonable legal conclusion that there is either no obligation, or no present obligation, there has been no inequity.

Of course, once the quiet title action was commenced, there was no requirement of tender at all, as respondent DeMarcus was asserting his title to the land, not his claim for money. There would be no reason to believe that one asking that title be quieted in him would accept money in lieu of the title thus asserted.

Further, see the affidavit of JOSEPHINE HANNER (A. page 44) to the effect that Mr. DeMarcus had stated to her that he would wait until the final determination of the divorce proceedings in the Arizona Supreme Court for the payment of his fee. This not only precludes any proper demand that tender should have been made by Mrs. Hanner, but further points out the inequities practiced by respondent herein.

There should be no practical difficulty or concern as to the final adjustment of equities. This Court is empowered by its mandate to set terms upon the payment of the judgment fee awarded DeMarcus herein if the execution, levy and sale are set aside. The Arizona Supreme Court did precisely the same thing in *Blasingame vs. Wallace,* 32 Ariz. 580, 261 Pac. 42.

DeMarcus Was Still Apparently Under the Aegis of the Superior Court and May Not Take Undue Advantage of It.

The respondent now argues that at the time of the execution he was "not acting as an officer of the Court". This is no answer to the argument that he was still an officer of the Court and acting under its aegis. As noted above, and as further pointed out by the affidavit of counsel for Mrs. Hanner (A. 43) Mr. DeMarcus was aware of the pendency of the apeal. While the precise amount of his fee was not an issue, there was an issue as to whether or not Mrs. Hanner should have paid all of it. In addition, the division of community property in itself was part of the subject of the appeal. *Hanner vs. Hanner,* 95 Ariz. 191, 388 P.2d 39. While DeMarcus might not have been actually acting as a Master at the time of the execution, he was still very much a part of the proceedings and was aware of it.

Nor can we see any validity to the respondent's argument concerning the price the property brought at the sale. We are not dealing with the situation of an independent third party bidding in at the sale. We are concerned with a direct party to the case, one who had actual knowledge of his own investigation of the value of the property concerned.

SUMMARY

We wish to reiterate that we are not asking this Court to declare any statute or rule of Court of the State of Arizona invalid. We believe that these statutes properly applied would provide sufficient notice. The point is, however, that no notice was in fact provided. If in fact none of the statutes had been followed, but

actual notice were given to Mrs. HANNER, the presence or absence of the statutes would be immaterial, equity would have been done. We have set forth the appropriate statutes, ARS 12-1281; 12-1282; 12-1552; 12-1553; 12-1562; 12-1559; 12-1621; and Arizona Rules of Civil Procedure, Rule 53(a), merely to show that our statutes and rules do require notice. The insuperable fact remains that no notice at all was given. It matters little which statute you claim was violated by the failure of notice, as long as due process was violated by the fact that no notice was given. Essential and elemental due process requires notice, and we believe, therefore, requires the reversal of the decision of the Supreme Court of the State of Arizona insofar as these parties are concerned.

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PETITION FOR REHEARING

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PETITION FOR REHEARING

COMES NOW THE Petitioner herein by and through her counsel, and pursuant to Rule 58 of the Rules of this Court, moves this Court for hehearing of the decision made and entered by this Court on April 29, 1968.

GROUNDS FOR REHEARING

A. THE DECISION HAS CREATED TWO CLASSES OF JUDGMENT DEBTORS WITH THE DIFFERING SUBSTANTIAL RIGHTS WHEREIN NO SUCH DISCRIMINATION IS AUTHORIZED BY STATUTE OR PRIOR CASE LAW.

It appears that there are now two different classes of judgment debtors in Arizona. One is the ordinary judgement debtor who has all the statutory protections against secret executions set forth in Arizona law and upheld in *Blasingame v. Wallace,* 32 Ariz. 580, 261 Pac. 42; the other is a debtor whose judgment is in favor of a special master. This unfortunate stands naked to the possibility of loss of everything he or she owns, no matter how excessive its value in relation to the judgment, and without possibility of redress.

Blasingame, supra. stands as solid precedent with no hint that it might have been overruled by either the Arizona Court or this Court. *Knight v. DeMarcus,* 102 Ariz. 105, 425 P.2d 837, from which this petition is taken, stands for the proposition that notice of the fact that a judgment has been entered for which execution may issue in the case of a special master's fee, obviates all other requirements relating to execution sales; relieves the sheriff and creditor from their onus, and withdraws from the debtor the shield of the law available to all other judgment debtors.

There is not a jot or tittle in the statutes to justify this conclusion, there is not a dram of logic to support it; and while we must admit that law and logic are not always inseparable, there has been no case precedent cited to or by the Court to justify

this discrimination. A special class has been created for the somewhat dubious benefit of Mrs. Hanner. Procrustes would be charmed.

B. STRAINED TECHNICALITIES SHOULD NOT DECIDE CONSTITUTIONAL ISSUES.

Counsel stated in argument that perhaps only Charles Dickens could have properly portrayed the history of this case. We are now beginning to believe that the talents of Franz Kafka would be more appropriate. We do not know, nor can anyone reading the case and its history, surmise, what issues were presented, resolved, distinguished or simply ignored. We can only guess that in all probability the majority of this Court held that the federal question was not properly presented in the Arizona Courts.

The dissenting opinion on the record of the case clearly points out the fact that the issue of improper execution *was* raised in the Superior Court and in the Supreme Court by the Petition for Rehearing. Even apart from the Petition for Rehearing, allegations concerning this lack of notice of execution were set forth in the briefs filed by Mrs. Hanner in the Supreme Court of Arizona. (Pages 4, 7, 8, 15, 16, 22, 23) While the argument in the Arizona Supreme Court up to the time of rehearing may not have been as pointed and direct as the argument was in this Court, the position was stated, the argument was there, and the record containing the complaints of Mrs. Hanner was before the Arizona Supreme Court.

Mrs. Hanner has not only been isolated as a newly created special type of judgment creditor, she has apparently also been isolated as a different type of petitioner for certiorari. As the dissenting opinion clearly pointed out, technicalities respecting briefing and pleading should not defeat consideration of a constitional question. *NAACP v. Alabama,* 377 U.S. 288; *Wright v. Georgia,* 373 U.S. 284; *Staub v. City of Baxley,* 355 U.S. 313, 318. Mrs. Hanner indeed would have some cause to ask why some petitioners who have not perfectly plead their case in the

lower courts, still receive a hearing in this Court, while she does not.

The matter becomes even more Orwellian when it is considered that the issue of improper execution was not only raised in the Supreme Court in the Motion for Rehearing, but was in the record from the lower court. This was not a case of failing to raise the issue *at all* until the Motion for Rehearing, which is all that the decided cases of this Court have previously held. Mrs. Hanner has thus been made the victim of yet a third discrimination not found in prior case law or statute.

C. THE RECORD BEFORE THE COURT CLEARLY CONTAINS PETITIONER'S POSITION.

The dissenting opinion noted somewhat accurately that the record before the Court printed for review was somewhat scanty. However, as was noted by both the dissenting opinion and the reply brief filed herein, there was no objection raised to the Petition for Certiorari on the grounds that the federal question had not been properly preserved. Under the Rules of the Court, the record is printed after certiorari is granted, and after the entire record had been vertified to this Court by the Supreme Court of Arizona. This complete record contains the abstract of record of the appeal before the Arizona Supreme Court and the briefs. Since no issue had been taken in the response to certiorari concerning the preservation of the federal question, it was not belived to be necessary that matters supporting the preservation of the federal issue be included in the printed record. The petitioner herein might well question the propriety of allowing the respondent to raise the issue of preservation of the question in this answering brief after failing to raise it in the response to certiorari, thus inducing a less complete record. While petitioner does not believe or mean to infer that there was anything intentional in this, if technicalities are to rule the day, petitioner should be able to claim advantage of one of them. In any event, Rule 36 (2) states in part:

"In designating the parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the Court for reference and examination, and shall not engage in unnecessary designation."

We believe no sensible person would believe that the designation of lengthy briefs would be necessary for inclusion in the appendix where no issue was raised as to the preservation of the federal question, and where presumably the Court in granting certiorari had reviewed the entire record to initially determine this question. This fact was pointed out in the reply briefs of the appellant herein (Page 2). Are we to believe that this rule exists not in complete form, but with the silent clause "unless the petitioner happens to be named Josephine Hanner" appended to this sentence in the rules?

D. THE ADMISSIONS OF THE RESPONDENT SHOULD BE SUFFICIENT GROUNDS STANDING ALONE FOR REVERSAL.

The respondent herein has been frank enough to admit in both his pleadings and argument before this Court that he was relying exclusively upon a technical objection arising from his interpretation of the thrust of the argument before the Arizona Supreme Court. Respondent's counsel frankly admitted that due process had not been observed, and that Mrs. Hanner was entitled to notice of the actual execution procedures. We find it impossible to explain how a person can be upheld in an execution sale of property four times the value of the judgment after they have admitted that the execution procedures were unconstitutional and denied the debtor due process. This is particularly true when the alleged technical error certainly did not deprive the respondent herein of any remedies he might have had, nor did it prejudice his position in either the Arizona Supreme Court or in this Court. The concept that fair play and substantial due process are of controlling weight in our courts has taken a thorough drubbing.

CONCLUSION

The petitioner herein has been deprived of a substantial right and denied substantial statutory and judicially established protections. She has thus been injured through an extremely rigid interpretation of a highly technical rule which has been either waived or ignored in numerous other cases for numerous other parties before this Court. We can hardly hope to be more clear, explicit or forceful than the dissenting opinion of Mr. Justice Douglas filed herein. An overstrained excessively technical interpretation of a minor procdural rule, resulting in no prejudice to the respondent, and not supported by statutory or case law precedent has been used to deprive Mrs. Hanner of property and to do her an admittedly substantial wrong by an admitted abuse of substantial due process. Petitioner deserves better treatment, and all notions of equity and fair dealing would support the granting of a rehearing in this matter.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 497.—October Term, 1967.

Josephine Hanner, Petitioner, v. Cecil DeMarcus et ux.	On Writ of Certiorari to the Supreme Court of Arizona.

[April 29, 1968.]

Per Curiam.

The writ of certiorari is dismissed as improvidently granted.